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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Officer Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SKYES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

2. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

Parties

In addition to the parties listed on the front cover of this petition, the Ohio Prosecuting Attorneys Association appeared as amicus on behalf of petitioner (then appellee) Engle in *Issac v. Engle*, F. 2d , (No. 78-3488, 6th Cir. 1980) upon rehearing en banc. The Ohio Public Defenders Association and the Appellate Review Office, a subdivision of the clinical program of the School of Law of the University of Akron appeared as amici for respondent (then appellant) Isaac.

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OPINIONS BELOW

The decision of The United States Court of Appeals for The Sixth Circuit in *Isaac V. Engle,* F. 2d (No. 78-3488, 6th Cir. 1980), upon rehearing en banc is not yet reported. (A 1). The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* is not reported (A24). The decision of the United States District Court For The Southern District of Ohio, Eastern Division in *Isaac v. Engle,* is unreported. (A38).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini,* F. 2d , (No. 79-3153, 6th Cir. 1980) is not yet reported. (A42). The decision of the United States District Court For The Northern District of Ohio, Western Division in *Bell v. Perini,* is not reported. (A49).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle,* (No. 79-3570) is unreported. (A60). The decision of the United States District Court For The Northern District of Ohio, Eastern Division in *Hughes v. Engle* is unreported. (A62).

JURISDICTION

The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* was entered February 8, 1980. (A24). Rehearing en banc was granted March 24, 1980. (A36). The en banc decision in *Isaac v. Engle, supra* was entered December 12, 1980 (A1).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini, supra* was entered December 12, 1980 (A42).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle, supra* was entered December 18, 1980 (A60).

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code (Page's) Section 2901.05A (eff. 1-1-74)

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Ohio Rev. Code (Page's) Section 2901.05A(Eff. 11-1-78)

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

STATEMENT OF THE CASE

Isaac

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon an affirmative defense of self defense. No objection was entered to an instruction that Isaac bore the burden of proof on self defense by a preponderance of the evidence.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. Therein, Isaac relied on the newly decided case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976). In *Robinson*, the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[1] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries*, 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

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[1]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41).

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitary and capricious and thus a denial of due process. (A26). As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se requires negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents (A20) and (A21) would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

Bell

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which had had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio and the Ohio Supreme Court raising issues not pertinent herein. Said appeals were respectively denied on April 8, 1975 and September 16, 1976.

Thereafter, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction on self defense.

On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49). On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

Hughes

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial and raised no objection to an instruction that he bore the burden of proof of the affirmative

defense of self defense by a preponderance of the evidence. In fact, Hughes' counsel specifically requested the charge that was given.

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court. Said appeals were respectively denied on September 24, 1975 and March 16, 1976, both in advance of the decision in *Robinson.* No contention was made in either appeal that the instructions on self defense violated due process.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. Therein, Hughes challenged the constitutionality of the instruction on self defense.

On June 26, 1979, the district court, after interim orders requesting briefing on exhaustion of state remedies and the merits, issued its opinion denying the petition. (A62). The district court found alternatively that Hughes' burden shifting claim was waived by failure of objection and that the instruction itself did not violate federal due process.

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 21, 1980. (A61).

Status of the Parties

During the interim of proceedings in the courts below, Hughes and Isaac were granted final releases as a matter of parole and thus have served their sentences. The action as to them proceeds only with respect to the collateral consequences of reversed convictions. Bell is still in prison and a "live" case is still in existence. In addition, approximately 25 pending "live" actions now exist in the appellate and district courts for which motions to stay issuance of decision are pending. The decisions in *Isaac, Bell* and *Hughes* are potential precedent for the release of every Ohio prisoner between 1974-1978 who relied on affirmative defenses.

ARGUMENT IN SUPPORT OF CERTIORARI

The instant cases present novel, complex, and important issues of both federal constitutional law and federal state relationships. As characterized by Chief Judge Edwards, concurring in *Isaac:*

> Few cases in the history of this Court have resulted in as much soul-searching thought and debate as has this case.

(A10). While obviously important to the State of Ohio, it is not just the fact of the number of prisoners who will be released under the authority of these cases—primarily homicides—or even the multiplicity and lack of uniformity of the opinions of the Court below—six separate opinions on rehearing en banc in *Isaac*—that demands review and reversal. Rather it is the misapplication of this Court's decision in *Wainwright v. Sykes, supra* and the lower court's reconstruction of Ohio's definition of the elements of crime that present issues of national importance. Utilizing the criteria of "cause" and "prejudice", as outlined in *Wainwright,* the petition will demonstrate not only the need for further clarification in these areas but that the instant cases present the proper factual and legal parameters for such resolution. In this regard, it should be noted that the United States Court of Appeals For The Fourth Circuit—also on rehearing en banc—is in conflict with the en banc decision in *Isaac. Cole v. Stevenson,* 620 F. 2d 1055 (4th Cir. 1980).

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES,* 433 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

Prior to 1974, Ohio followed the traditional common law view that a defendant bore the ultimate burden of proof by a preponderance of the evidence when an affirmative defense

like insanity, self defense or duress was raised. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). The traditional instruction outlined the statutory elements of the crime, the state's burden of proof beyond a reasonable doubt as to such elements, the factors constituting the affirmative defense and the defendant's burden, and the repeated admonition that the failure of the defendant to meet his burden on the affirmative defense did not relieve the state of its ultimate burden of proof as to the elements of the crime. In each of these cases, the traditional instruction was given.

In 1974, Ohio enacted O.R.C. Section 2901.05, which as interpreted in *Robinson* relieved the defendant of this historic obligation of burden of proof, substituting instead merely a "burden of production". In a real sense, the decision was not foreshadowed either by the terms of O.R.C. Section 2901.05 nor interim decisions of the Ohio Supreme Court. In *State v. Rogers*, 43 Ohio St. 2d 28, 33 (1975), decided after O.R.C. Section 2901.05 had been enacted but prior to *Robinson*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification and is, therefore, an affirmative defense (R.C. 2901.05[c] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence.

As a result, few Ohio counsel objected to the traditional instruction. It is from this factor that the appellate court found "cause" under *Wainwright*.

In *State v. Humphries, supra*, the Ohio Supreme Court found as a matter of state law that the failure to object would be deemed a procedural waiver of a *Robinson* claim. Therein, the Court specifically relied upon prior direction by this Court that a subsequent decision is not per se "cause" sufficient to overcome the normal contemporaneous objection rule:

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977). In *Hankerson*, this Court held *Mullaney v. Wilbur*, 421 U.S. 684

(1975) to be fully retroactive. The above statement was made in reaction to the state's concern that such holding would substantially undermine the finality of convictions entered prior to *Mullaney*. In reliance on such holding, Ohio has consistently found the *Robinson* error not to be "plain error". *State v. Williams*, 51 Ohio St. 2d 112 (1977); *State v. Long*, 53 Ohio St. 2d 91 (1978). The holding of the appellate court below is a direct rejection of the direction given in *Hankerson*.[8]

The majority in the panel decision in *Isaac* dismissed the quoted portion of *Hankerson* as mere "dicta" (A27) and found Ohio's reliance on it to be arbitrary and capricious. (A31). This created an anomoly for the appellate court as that court had flirted with the very same proposition:

> As stated above, unless we accord retroactive application to the *Mauro* decision no violation of the IAD occurred in the present case. In light of our conclusions that appellant waived any IAD claim he may have had and that Section 2255 is not an appropriate vehicle to raise appellant's IAD claim, we need not decide whether *Mauro* should receive retroactive application.

Mars v. United States, 615 F. 2d 704, 707 (6th Cir. 1980). Moreover, since *Hankerson*, this Court has consistently re-affirmed that portion quoted above. *Lee v. Missouri*, 439 U.S. 461 (1979); *Harlin v. Missouri*, 439 U.S. 459 (1979). It was for this reason the plurality en banc in *Isaac* found the majority panel decision to be an unsatisfactory basis of decision. (A5).

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[8]The finding of "cause" in these cases allowed the appellate court to bypass a more direct challenge to *Wainwright* itself. In prior decisions of the Sixth Circuit a substantial number of judges have expressed the view that a federal court may review an alleged error if the state court system has a plain error review mechanism—even if the state court has specifically rejected that it is plain error under that system. See specifically: *Hockenbury v. Sowders*, 633 F. 2d 433 (6th Cir. 1980); see also: *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978); *cert. denied*, 439 U.S. 955; *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978); *Cook v. Borderkircher*, 602 F. 2d 117 (6th Cir. 1979) *cert. denied*, 444 U.S. 936; *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978); *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980). Such view of *Wainwright* undercuts the purpose of the decision—to make the trial itself the main component of the criminal system and not a forerunner of later discovered collateral claims. It also runs contrary to this Court's admonition in *Henderson v. Kibbe*, 431 U.S. 145 (1977) that challenges to a state court's instructions require a greater showing than "plain error".

Relying on *O'Connor v. Ohio*, 385 U.S. 95 (1966), the plurality en banc in *Isaac* found cause in the "futility" of counsel making an objection in light of well settled law (A 6). Aside from the fact that counsel in *Robinson* did make the objection and was successful on appeal, the present case is not *O'Connor*. In *O'Connor*, trial took place prior to the time that the constitutional provision relied upon had even been applied to the states. Here, O.R.C. Section 2901.05 had been enacted, and *Mullaney* and *In re Winship*, 397 U.S. 358 (1970) had been decided. Thus, while the decision may not generally have been anticipated, it was not unanticipatable.

The problem with the plurality's analysis is that it relieves counsel from any obligation to attempt to change the law and removes any possibility of waiver. Presumably if the objection is well known, the failure to make it will be deemed ineffectiveness of counsel. *Beasley v. United States*, 481 F. 2d 687 (6th Cir. 1974). On the other hand, if the objection is not perceived until a subsequent decision is rendered, then "cause" is found in the lack of anticipation. Such interpretation renders *Wainwright* a nullity.

In dissent, Judge Kennedy correctly stated:

> If, as this court holds, a change in interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the state's contemporaneous objection rules. I do not believe that the suggestion in *Hankerson* to the contrary can be so freely ignored.

(A22) See also: *Cole v. Stevenson, supra*. As the appellate court "freely ignored" *Hankerson*, certiorari should be granted.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES, TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

In *Carter v. Jago*, F. 2d (No. 79-3317, 6th Cir. 1980), (A), the same appellate court as decided the cases sought to be reviewed herein held in a pre 1974 trial, that the traditional common law instruction on the affirmative defense of self defense does not impermissably shift the burden of proof on the elements of crime. See also: *Krzeminski v. Perini, supra* at 124:

> *Patterson* makes it clear that so long as the jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self defense, extreme emotional disturbance or insanity upon the defendant.

This holding creates the bottom line analysis that a trial in Ohio in 1973 with the same instruction as given in these cases is constitutionally fair, whereas in these cases the instruction is constitutionally unfair. That the time parameters of the trial should make a difference in constitutional terms underscores the error of the court below.

In *Carter*, the appellate court correctly analyzed the dichotomy between this Court's decisions in *Mullaney, supra* and *Patterson v. New York*, 432 U.S. 197 (1977). In *Mullaney*, the state had presumed the very factor—malice—which made a distinction between degrees of culpability as defined by the state law whereas in *Patterson*, the state bore the burden of proof as to each element of the crime and nothing required for a finding of criminal liability was presumed. See also: *Rivera v. Delaware*, 429 U.S. 877 (1976); *State v. Frost*, 57 Ohio St. 2d 121 (1979). The traditional instruction that failure of the affirmative defense did not relieve the state of its burden of proof as to the elements of the crime drew the same dichotomy. No element of the crime was presumed.

To reconcile the fact that the instruction given is not per se violative of due process (But Cf Judge Edward's concurring opinion and Judge Merritt's dissent A10, 20)[3] the plurality in *Isaac* held that the enactment of O.R.C. Section 2901.05 in 1974 created a functional element of the crime of "absence of the affirmative defense."

> As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes as the states have chosen to define them beyond a reasonable doubt. We further conclude that once a state assumes the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume.

(A 9). Simply stated, the court converted a change in the burden of proof with respect to an affirmative defense into an additional element of crime not included within the statutory definition of that crime. In so doing, the appellate court violated the admonition of this Court in *Mullaney, supra* at 691:

> . . . that state courts are the ultimate expositors of state law, . . . and that we are bound by their constructions except in extreme circumstances not present here.

Self defense has traditionally been an affirmative defense under the law of Ohio. As such, the existence or non existence of the defense is collateral to the elements of crime:

> This court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses". As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but rather, they represent a substantive or independent matter" which the defendant claims exempts him from liability even if it is conceeded that the facts claimed by the prosecution are true". Among those defenses in Ohio are self defense, duress, insanity, and intoxication.

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[3]The *Carter* court rejected the notion that due process requires the negation of self defense:

> Allowing a State to treat self defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislature branch sufficient latitude to define mitigating factors that affect criminality.

(A82) Thus, while noted in *Patterson* that some limits may be placed on a legislature's definition of crime, making self defense an affirmative defense is not violative of this principle.

State v. Poole, 33 Ohio St. 2d 18, 19 (1973). Nothing in the enactment of O.R.C. Section 2901.05 in 1974 changed the characterization of self defense as an affirmative defense. While *Robinson* was intended to lessen the defendant's obligation to raise the affirmative defense, it still remains collateral to the question of whether the elements of the crime have been proved.

That the appellate court chose to rewrite Ohio law is most clearly seen by their failure to even cite *State v. Abner*, 55 Ohio St. 2d 251 (1978). In *Abner*, the Ohio Supreme Court rejected the contention that a defendant under *Robinson* was entitled to a specific instruction on the state's burden to disprove the absence of self defense. By doing so, the Ohio Supreme Court reaffirmed that even under *Robinson* self defense is an affirmative defense, not an element of the crime. As found by Judge Lively in dissent:

> The jury does not reach a defense of self defense until it finds that all elements of an offense have been established beyond a reasonable doubt.

(A18).

Petitioners do not minimize the notion that changing the burden of proof on the affirmative defense of self defense may in some cases alter the outcome of a trial. The question before the Court however is whether the trial of these respondents was fundamentally unfair. While *Robinson* adopted a benefit for defendants to the extent it lessened their burden on the affirmative defenses, *Robinson* was itself not constitutionally required. *Carter v. Jago, supra.* As such, the appellate court below found prejudice in the failure of the state courts to apply a state statutory and non constitutionally required benefit. Such holding reflects a misperception of the role of a federal court upon habeas corpus—to correct errors of constitutional dimension. As the court below reached its result by rejecting the Ohio Supreme Court's own construction of its law, certiorari should be granted.

CONCLUSION

In *Wainwright v. Sykes*, this Court adopted a standard of "cause and prejudice" for reviewing whether a state procedural waiver would be an independent state ground precluding review. Little direction was given to the lower courts as to the definition of cause and prejudice and as illustrated by these cases, the lower appellate courts have struggled to give meaning to such phrases. As the instant cases present a viable model in which to further define "cause" and "prejudice", certiorari should be granted. As the decision of the court below is erroneous on both "cause and prejudice" reversal is required. By that means, Ohio will not suffer the vacation of numerous final and fundamentally fair convictions.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Counsel of Record

RICHARD DAVID BRAKE
Assistant Attorneys General

State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing petition for writ of certiorari have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this day of February, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302, Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
Counsel of Record

APPENDIX

Isaac v. Engle, F. 2d (No. 78-3488, 6th Cir. 1980), Opinion, December 12, 1980 (en banc.) A1

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No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superintendent,
Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

[Decided and Filed December 12, 1980]

Before: Edwards, Chief Judge; Weick, Lively, Engle, Keith, Merritt, Brown, Kennedy, Martin and Jones, Circuit Judges, sitting *En Banc*.

Brown, Circuit Judge, delivered the opinion of the Court in which Weick, Keith, and Martin, Circuit Judges, concurred; Edwards, Chief Judge (p. 12) and Jones, Circuit Judge (pp. 13-16) delivered separate concurring opinions, and Lively, Circuit Judge (pp. 17-21), Merritt, Circuit Judge (p. 22) and Kennedy, Circuit Judge, (pp. 23-25) delivered dissenting opinions.

Bailey Brown, Circuit Judge. In this appeal, we are confronted with the difficult task of determining the federal constitutional consequence, if any, of two decisions by the Supreme Court of Ohio. One of these decisions for the first time construed an Ohio statute to place the burden on the state in criminal cases of proving the absence of affirmative defenses, and the other decision held that only those defendants who had objected at the trial to jury instructions placing the burden on defendant to prove an affirmative defense could avail themselves on appeal of this interpretation of the statute.

I

Prior to 1974, Ohio followed the traditional common law rule that the defendant in a criminal case not only had the

burden of going forward with evidence to create an issue as to an affirmative defense but also had the ultimate burden of proving such affirmative defense by a preponderance of the evidence. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). As of January 1, 1974, however, a new statutory provision became effective. That provision, codified as Ohio Revised Code Section 2901.05(A), stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

The language of the new statute was not free of ambiguity. As a result Section 2901.05(A) was not initially considered to effect any change in the previous common law rule. As late as 1975, the Supreme Court of Ohio reaffirmed at least in a dictum the principle that a defendant must bear the burden of proving affirmative defenses by a preponderance of the evidence. *State v. Rogers*, 43 Ohio St. 2d 28 (1975).[1]

II

In 1975, appellant, Lincoln Isaac, was indicted in Ohio for felonious assault. At his trial, Isaac asserted that he had acted in self-defense. The trial court instructed the jury without any objection by Isaac that it was incumbent on Isaac to demonstrate self-defense by a preponderance of the evidence. The jury found Isaac guilty of the lesser included offense of aggravated assault. Isaac was sentenced to a term of six months to five years imprisonment.

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[1] In *Rogers*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification, and is, therefore, an affirmative defense (R.C. 2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence. See *State v. Seliskar, supra*, 35 Ohio St. 2d 95, 298 N.E. 2d 582.

Prior to any appeal by Isaac, the Supreme Court of Ohio, in *State v. Robinson*, 47 Ohio St.2d 103 (1976), concluded that Section 2901.05(A) had changed the previously accepted common law rule allocating the burden of proof in criminal cases. The court construed Section 2901.05(A), effective January 1, 1974, to adopt the majority rule that a defendant only has the burden of coming forward with sufficient evidence to create an issue as to an affirmative defense and that once such evidence is presented, the prosecution then must demonstrate beyond a reasonable doubt the guilt of the defendant even to the extent of disproving such affirmative defense. Interpreting Section 2901.05(A) in this manner, the Supreme Court of Ohio held that any jury instruction placing the burden of proving an affirmative defense on the defendant constituted prejudicial error.

Relying on *Robinson*, Isaac appealed his conviction. The Court of Appeals for Pickaway County held that Isaac had waived any error in the jury instruction on burden of proof by failing to object to that instruction. Accordingly, it affirmed Isaac's conviction. Isaac thereafter filed an appeal in the Supreme Court of Ohio. That appeal was dismissed in 1977 for lack of a substantial constitutional question.

On the same day that it dismissed Isaac's appeal, the Supreme Court of Ohio reaffirmed the interpretation of Section 2901.05(A), placing the burden on the state to prove absence of affirmative defenses, that it had made in *Robinson*. *State v. Humphries*, 51 Ohio St.2d 95 (1977). At the same time, however, the court held that appellant Humphries could not avail himself of this interpretation of the statute because he had not objected to the charge to the jury on this ground, relying on Ohio Criminal Rule 30. The court, nevertheless, in the same opinion, held that appellant Meyer, who had had a bench trial, could effecitvely raise the question on appeal since Criminal Rule 30 did not apply to such trials. Ohio has continued to so apply its contemporaneous objection rule. *State v. Long*, 53 Ohio St.2d 91 (1978).

In 1978, Isaac sought habeas corpus relief in federal district court. Without reaching the merits of Isaac's claim, the district court dismissed his petition. The court, relying on *Wainwright v. Sykes*, 433 U.S. 72 (1977), held that federal habeas corpus

review was precluded by an adequate state procedural ground, specifically, the Ohio rule that the failure to object to a jury instruction waived any error in such instruction.

In *Isaac v. Engle*, F.2d (decided February 8, 1980) a panel of this court reversed the decision of the district court, Judge Celebrezze writing a concurring opinion. The focus of the panel opinion was on the constitutionality of Ohio's use of its contemporaneous objection rule as a means of limiting the benefits of the *Robinson* decision. The panel opinion concluded, preliminarily, that *Wainwright v. Sykes* was simply not applicable and therefore there was no bar to consideration of this constitutional claim since such claim was not directed at the substantive validity of the jury instructions allocating the burden of proof. As to the merits of the claim, all three members of the panel determined that Ohio's failure to grant Isaac the benefits of *Robinson* represented a denial of due process. The panel divided, however, as to the appropriate basis for reaching such a conclusion. Judges Peck and Phillips determined that Ohio's use of its contemporaneous objection rule was arbitrary and capricious and therefore a denial of federal due process under the circumstances of this case because there was no basis for objection to the jury instruction at the time of Isaac's trial. Judge Celebreeze, adopting a somewhat broader approach, maintained that the placing of the burden of proof is so critical in the truth-finding process that the change in interpretation of the law allocating that burden must have "retroactive application" without any limitations based on state procedural rules.

We granted a petition for rehearing *en banc* to consider the important issues presented by this case.

III

We recognize that the use of a contemporaneous objection rule as a procedural device to deny a defendent the retro active benefits of an important change in state law is arguably arbitrary and capricious when there did not exist a reasonable basis for an objection at the time of the trial. The Supreme Court, however, has at least suggested that such a use of a procedural rule may be a valid means of limiting the retro-

active benefit of a new constitutional principle. *Hankerson v. North Carolina*, 432 U.S. 233, 244 n. 8 (1977). Moreover, as a matter of comity, states are entitled to some deference in the manner that they apply their own procedural rules. We are therefore hesitant to hold, as did the panel opinion, that this use of a contemporaneous objection rule to limit the retroactive benefits of a new statutory interpretation is, *ipso facto*, violative of due process.

We believe that the more appropriate focus is on the underlying claim, in this case the constitutional validity of the jury instructions given at Isaac's trial as considered in light of *Robinson* and *Humphries*. In this context, the threshold question, then, is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim.

IV

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Supreme Court held that a petitioner's failure to comply with a state procedural rule represents an independent and adequate state ground barring habeas corpus review of a constitutional claim absent a showing of cause for the noncompliance and a showing of prejudice resulting from the constitutional violation.[2] The Court, however, declined to define precisely what would constitute "cause" and "prejudice." That task was left for development in subsequent cases. While the "cause" and "prejudice" standards of *Wainwright* still remain somewhat undefined, we conclude that the circumstances of this case satisfy both of those standards.

At the time of Isaac's trial, there was no indication that the jury instruction given by the trial court was contrary to state law. Ohio had traditionally placed the burden of proving

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[2] *See also Hockenbury v. Sowders*, F. 2d , No. 79-3339 (6th Cir. April 17, 1980).

affirmative defenses on the defendant. Moreover, the Supreme Court of Ohio had in a dictum stated that the recently enacted statute, Ohio Revised Code Section 2901.05(A), did not change the previous common law rule. *See State v. Rogers, supra.* Confronted with such well-established law, it would have seemed futile for Isaac to object to a jury instruction allocating to the defendant the burden of proving self-defense. A defendant cannot be expected to predict a change in the interpretation of state law when the law is so well-established and there has been no hint of a change in that law. *See O'Connor v. Ohio,* 385 U.S. 92 (1966). Moreover, it was not, as will be seen hereafter in dealing with the merits of Isaac's constitutional claim, until the later decision of the Supreme Court of Ohio in *Robinson, supra,* interpreting Ohio Revised Code Section 2901.05(A) as placing the burden on the state to prove the absence of affirmative defenses, could Isaac know that the charge to the jury violated federal due process. Therefore, Isaac had legitimate cause for his failure to object to the jury instruction allocating the burden of proof.

The resulting prejudice is clear. The burden of proof is a critical element of the fact-finding process in a criminal trial. *See In re Winship,* 397 U.S. 358 (1970). An error in the allocation of that burden, here shifting from the state its burden of proving absence of self-defense beyond a reasonable doubt to the defendant to prove self-defense by a preponderance of the evidence, profoundly affects the basic fairness of a defendant's trial. In such cases, prejudice may be presumed. *Rachel v. Bordenkircher,* 590 F.2d 200 (6th Cir. 1978).[3]

Having found both "cause" and "prejudice," we are not precluded under *Wainwright v. Sykes, supra,* from considering whether it was a denial of due process to place on Isaac the burden of proving that he had acted in self-defense.

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[3]Since at trial Isaac by his testimony made a substantial issue as to his self-defense contention, he was in fact prejudiced by the court's charge to the jury and therefore Isaac need not rely on such presumption.

V

In *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that due process requires that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime." The underlying principle of *Winship* is clear. A heavy burden of proof must be imposed in criminal cases in order to minimize the chances of innocent persons being convicted. But while its principle is clear, the application of *Winship* has proved somewhat difficult in determining to what extent the prosecution must prove the absence of any affirmative defenses raised by a defendant.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court held unconstitutional a Maine law placing on the defendent the burden of proving that, in killing a person, he had acted in the heat of passion. The Court seemed to suggest that a state could not, consistent with due process, shift to the defendant the burden of demonstrating any fact which decreased the degree of culpability. Under this interpretation of *Mullaney*, the prosecution would be required to prove beyond a reasonable doubt the absence of any affirmative defense raised by the defendant, regardless of whether that affirmative defense negated an element of the crime as defined by state law.

Such a broad interpretation of *Mullaney* was rejected in *Patterson v. New York*, 432 U.S. 197 (1977). In that decision, the Court upheld the validity of a New York statute allocating to the defendant the burden of proving that he had killed a person while he was under the influence of extreme emotional distress, saying:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of

> all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Id. at 210.

We construe *Mullaney* and *Patterson* together to hold that due process requires that a state prove all elements of the crime as the state has defined the crime, that there are due process limits on the extent to which a state may shift the burden to defendant by the way in which it defines crimes, but that a state may, consistent with due process, place the burden on defendants to prove defenses that have traditionally been treated as affirmative defenses if such defense does not negate an element of the crime. *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980).

VII

The indictment charged Isaac with felonious assault under Ohio Revised Code Section 2903.11. This crime is defined by the statute as follows:

> Felonious assault
> (A) No person shall knowingly:
> (1) Cause serious physical harm to another

However, Isaac was convicted of the lesser included offense of aggravated assault under Ohio Revised Code Section 2903.12. This crime is defined by the statute as follows:

> Aggravated assault
> (A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly:
> (1) Cause serious physical harm to another

At trial it was Isaac's contention that he was not guilty of any crime because he had acted in self-defense. In this connection the trial court charged the jury, stated succinctly, that, in order to establish this defense, it was necessary that he show by the preponderance of the evidence that, in striking the other party, Isaac reasonably believed that such action was necessary to protect himself from great bodily harm.

The defense of self-defense as defined in the charge to the jury at Isaac's trial does not negate an element of the crime of felonious assault or aggravated assault as such are defined in Ohio Revised Code Section 2903.11 and Section 2903.12. This is true since one could act knowingly (felonious assault) or knowingly and while under extreme emotional distress brought on by serious provocation reasonably sufficient to incite him into using deadly force (aggravated assault), and yet act in self-defense. Moreover, while according to *Mullaney* and *Patterson*, as we have noted, there are due process limits to the extent to which a state may redefine the elements of a crime and thereby reallocate the burden of proof to the defendant, *Patterson* holds that in failing to make absence of self-defense an element of the crimes of felonious or aggravated assault as defined in Section 2903.11 and Section 2903.12, Ohio did not violate due process.

Although the statutes defining felonious and aggravated assault did not make absence of self-defense an element of the crime, it is arguable that, in enacting the statute that was construed to place the burden on the state of proving absence of self-defense, Ohio had so made it an element of the crime. In *State v. Humphries, supra*, at 111, one of the Ohio justices did say that, in so construing Ohio Revised Code Section 2901.05(A), absence of affirmative defenses had been made an element of the crimes. (Locher, J., concurring in part and dissenting in part). We believe, however, that, under *Mullaney* and *Patterson*, the proper question to ask is: Can Ohio, having by statute assumed the burden of proof with respect to absence of self-defense, consistently with due process convict a defendant by applying a different and lesser standard of proof.

As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes, as the states have chosen to define them, beyond a reasonable doubt. We further conclude that, once a state assumed the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume. From the point of view of fairness and due process, there is no practical difference

between requiring a state to prove the elements of crimes beyond a reasonable doubt and requiring it to meet its assumed burden of proving absence of affirmative defenses beyond a reasonable doubt. Thus we conclude that, in Isaac's trial, placing the burden on him to prove self-defense by a preponderance of the evidence constituted a denial of federal due process.

VII

Following the decisions of the Supreme Court of Ohio in *Robinson* and *Humphries*, the Ohio legislature amended Ohio Revised Code Section 2901.05(A) so as to readopt the common law rule that a defendant must prove any affirmative defense by a preponderance of the evidence. On any retrial, Isaac is entitled to jury instructions consistent with Ohio law in 1975 as construed in *Robinson*. Any other result would give *ex post facto* effect to the 1978 amendment of Section 2901.05(A). *See Breest v. Helgemoe*, 579 F. 2d 95 (1st Cir.), *cert. denied*, 439 U.S. 933 (1978); *United States v. Williams*, 475 F. 2d 355 (D. C. Cir. 1973).

Accordingly, the judgment of the district court is reversed and the case is remanded. The district court is directed to order that Isaac be released from custody unless Ohio chooses to retry him within a reasonable time to be determined by the district court.

Edwards, Chief Judge, concurring. Few cases in the history of this court have resulted in as much soul-searching thought and debate as has this case. I write to express concurrence in the result reached by Judge Bailey Brown's opinion for the majority of the en banc court. In my view, however, under *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), cited with approval and distinguished on the facts in *Patterson v. New York*, 432 U.S. 197 (1977), the due process clause of the United States Constitution commands that the burden of proof of criminal intent—clearly an element of Ohio's aggravated assault law—be placed on the prosecution. Here the burden of proof of self-defense was definitely placed on the defendant. Criminal intent of aggravated assault and self-defense are, in my view, completely irreconcilable. To

require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent.[1]

As to the retroactivity and the cause and prejudice issues discussed by the Supreme Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also Hankerson v. North Carolina*, 432 U.S. 233 (1977), I join fully in Judge Brown's careful analysis showing that Isaac is entitled to a new and fair trial.

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[1]A full understanding of this record has convinced me that this case is not a satisfactory medium for decision of the difficulties inherent in the collision between Ohio's tangled laws pertaining to self-defense and federal due process standards as exemplified in *In re Winship*, *Mullaney v. Wilbur*, and *Patterson v. New York*. A motion to vacate the motion for en banc consideration as improvidently granted has, however, failed.

Jones, Circuit Judge Concurring.

I concur in the result. A majority of the *en banc* Court agrees on only one point: that Isaac's imprisonment is in violation of due process of law. This result was reached by the original panel. The *en banc* Court does not agree on precise issues to be decided as well as their correct resolution. I reluctantly write separately because I believe that the plurality opinion does not provide a rationale to support its conclusion and to explain my disagreement with Judge Lively's and Judge Kennedy's dissenting opinions.

I.

Ohio Rev. Code Ann. Section 2901.05(A) became effective on January 1, 1974. In 1976 the Ohio Supreme Court held that Section 2901.05(A) required defendants only to proffer evidence sufficient to raise the affirmative defense of self-defense. *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). Isaac was convicted in 1975. At Isaac's trial the jury was instructed that defendant had the burden of *proving* the affirmative defense of self-defense. Isaac did not object to such a jury instruction. The decision in *State v. Humphries*, 51 Ohio St.2d 95, 364 N.E.2d 1354 (1977) limits the retroactive application of *Robinson* to defendants who objected to the jury instruction at trial requiring defendants to prove self-defense. Isaac's petition for a writ of habeas corpus challenges only the use of Ohio's contemporaneous objection rule to deny him the benefit of the retroactive application of *Robinson*.

II

The plurality opinion defines the issue to be decided as whether Ohio can convict a defendant by applying a different or lesser standard of proof than that required by statute. The plurality opinion holds that it is "unfair" for a state not to meet the burden of proof assumed by it. However, we are not told the reasons *why*.

The Ohio Supreme Court justified applying a "different or lesser standard of proof" than that required by statute because Isaac failed to object to the jury instructions at trial. *State v. Humphries, supra.*

The contemporaneous objection rule presupposes the existence of an alleged error to be corrected. Isaac's jury instructions were in accord with well-settled Ohio law at the time of his trial. Thus, the panel's decision held that Ohio's use of the contemporaneous objection rule in Isaac's case did not have a "real and substantial relation to the ends sought to be attained by the use of" such a rule. This approach recognizes that state judicial decisions as well as state legislative determinations are subject to due process scrutiny. This analysis also implicitly recognizes that a state's failure to follow its own procedural rules raises due process claims cognizable under 28 U.S.C. Section 2254.

The concurring panel opinion stated that Isaac's jury instructions could have been objected to at trial on the principal enunciated in *Mullaney v. Wilbur,* 421 U.S. 684 (1975).[1] However, it correctly relied upon *Hankerson v. North Carolina,* 432 U.S. 233 1977, to hold that a state cannot deny full retroactive effect to a change substantially affecting the truth-finding process of a criminal trial.

The plurality opinion rejects these two plausible rationales, but offers none in their place.[2]

III.

Judge Lively's dissent contends that the *Robinson* court's interpretation of Section 2901.05(A) to require defendants *only* to proffer evidence sufficient to raise a defense of self-defense "merely reduces the quantum of proof necessary to

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[1] *See* discussion of *Mullaney* in part III, *infra.*

[2] Isaac has not challenged the constitutionality of his jury instructions because *Robinson* holds such instructions were improper as a matter of state law. Nor has Isaac challenged the constitutionality of the statute under which he was convicted. Thus, the lengthy discussion of Parts V and VI of the plurality opinion is dicta.

sustain such a defense." Assuming Judge Lively's interpretation of *Robinson* is correct, Issac was entitled to a jury charge that if the jury had a reasonable doubt as to whether he acted in self-defense he should be found not guilty. Or, to state it differently, this is the equivalent of charging that the burden is on the state to *prove* the absence of self-defense beyond a reasonable doubt. Additionally, Judge Lively's interpretation of *Robinson* has an untenable result; the burden of proof of the affirmative defense of self-defense is on neither the defendant nor the prosecution.

Judge Lively also argues that "the quantum of proof necessary to sustain the defense of self-defense is a state procedural rule" which the state need not follow. However, a change in the "quantum of proof necessary to sustain the defense of self-defense" affects the truth-finding process at a criminal trial." *Hankerson* holds that such a change must be retroactively applied.

Judge Kennedy's dissent asserts that the application of Ohio's contemporaneous objection rule bars federal review.[3] The decision in *Wainwright v. Sykes*, 433 U.S. 72 (1977) holds that a defendant's failure to object to error at trial will *not* bar federal review of his conviction if he had "cause" not to object and the alleged error is prejudicial. Isaac had "cause" not to object to the jury instructions at his trial. Isaac neither knew nor could have known that the jury instructions at his trial were improper under *Robinson*, decided two years after his trial. There is no better "cause" for Isaac's failure to object to jury instructions than that the jury instructions were proper at the time of his trial.

Judge Kennedy mistakenly argues that the decision in *Mullaney* was a predicate for Isaac to object to jury instructions at his trial. *Mullaney* decided the issue of the constitutionality of the definition of a substantive offense. Neither Isaac nor the defendant in *Robinson* challenge Ohio's definition of a sub-

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[3] "The question of when and how defaults in compliance with state procedural rules can preclude our consideration at a federal question is itself a federal question." *Henry v. Mississippi*, 379 US 443, 447 (1965).

stantive offense. Isaac, as well as the defendant in *Robinson* argue only that their jury instructions were inconsistent with a state law, ORC Section 2901.05(A).

Lively, Circuit Judge, dissenting.

I respectfully dissent. Judge Brown's opinion recognizes that a state may place the burden of proving an affirmative defense upon a defendant so long as it does not require the defendant to prove an essential element of the crime. This is the holding of *Patterson v. New York*, 432 U.S. 197 (1977). However, the opinion of Judge Brown appears to treat O.R.C. Section 2901.05(A),[1] in which the legislature reduced the burden on a criminal defendant relying upon the affirmative defense of self-defense, as the equivalent of making the absence of self-defense an element of the crime of felonious assault. Thus the opinion holds that the State of Ohio violated Isaac's due process rights by permitting his conviction under instructions which placed upon him the burden of proving by a preponderance of the evidence matters as to which it had, by statute, assumed the burden of proof.

In *State v. Robinson*, 47 Ohio St. 103 (1976), the Ohio Supreme Court construed O.R.C. Section 2901.05(A) and specifically declined to consider constitutional arguments based on *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The syllabus in *Robinson*, which contains the holding of the court under Ohio practice, states:

> In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such defense by a preponderance of the evidence. (R.C. 2901.05[A] construed.)

I do not read O.R.C. Section 2901.05(A) and the *Robinson* holding as placing on the state a burden which is the equivalent of its burden of proving beyond a reasonable doubt each element of a charged offense. The statute and decision merely reflect the state's determination that a verdict of not guilty by

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[1] Ohio Revised Code Section 2901.05(A), effective January 1, 1974, provided:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

reason of self-defense may be based on "evidence of a nature and quality sufficient to raise that defense." *Robinson, supra.* They eliminate the former requirement that self-defense be established by a preponderance of the evidence. In reducing the quantum of proof required to permit an acquittal on grounds of self-defense, the state did not make a determination that absence of the facts necessary to sustain a plea of self-defense "must be either proved or presumed." *Patterson, supra,* 432 U.S. at 215.

I base this interpretation of Ohio's action upon my understanding of the nature of the defense of self-defense. In *Patterson,* supra, the Supreme Court recognized that there is a type of affirmative defense which does not seek to negative any facts which the state is required to prove in order to convict; that is, it does not put into issue any of the elements of the offense. Instead, such an affirmative defense constitutes "a separate issue." 432 U.S. at 207. This is clearly true of self-defense under Ohio law.

In *State v. Poole,* 33 Ohio St. 2d 18 (1973), the Ohio court recognized that all affirmative defenses to criminal charges are not the same. Some, such as accident or alibi, deny the existence of one or more elements of an offense. Affirmative defenses such as these put in issue an element of the charge and have no effect on the burden of proof. The burden is on the state to prove every element of an offense beyond a reasonable doubt whether the issue is joined by a plea of not guilty or by reliance on an affirmative defense of the type which controverts the existence of a particular element. To require a defendant to prove an affirmative defense of this type would be a violation of due process.

In *Poole* the Supreme Court of Ohio also defined self-defense under Ohio law. It stated that the defense of self-defense admits the existence of the elements of an offense but claims an independent ground for escaping conviction. It is in the nature of a civil plea of confession and avoidance—it admits the facts claimed by the prosecution to establish an offense but relies on the existence of a separate set of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability. As the Supreme Court in *Patterson* recognized, it does not

violate due process to require the defendant to prove the existence of these facts or circumstances by a preponderance of the evidence. The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt. Thus there is no impermissible shifting of the state's burden.

Hankerson v. North Carolina, 432 U.S. 233 (1977), does not require us to reverse the district court. In *Hankerson* the state court construed the plea of self-defense as putting in issue an element of the offense of murder—the element of unlawfulness. For a trial court to require a defendant to prove self-defense, thus defined, by a preponderance of the evidence, was clearly a violation of the rule laid down in *Mullaney v. Wilbur*. Since the Ohio Supreme Court has defined self-defense is just the opposite way in *Poole*—as not controverting an element of the charge—*Hankerson* does not control this Ohio habeas case. The jury charge at Isaac's trial did not shift the burden of proof as to any element of the offense, and thus did not violate the *Winship-Mullaney* rule. All that occurred was that a state court failed to follow a state procedural statute as it was subsequently construed by the state supreme court. No constitutional error occurred at Isaac's trial, in my opinion.

Nor do I perceive a constitutional violation in the Ohio Supreme Court's decision to limit the benefit of a retroactive application of its construction of the Ohio statute to those persons who objected to an erroneous instruction at trial. Though the Ohio court interpreted O.R.C. Section 2901.05(A) in such a way as to make the instruction at Isaac's trial on the burden of proving the affirmative defense erroneous, the Constitution of the United States did not require such a construction. I believe it was within the authority of the court which construed the statute to determine the extent of its retroactive application.[2] The state did not violate Isaac's due process rights by requiring

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[2]In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court held that the decision whether to apply a new *constitutional* holding retroactively is largely one of policy. If this is so with respect to constitutional holdings, it cannot be argued that a stricter standard applies where a state court issues a new statutory interpretation.

him to abide by a longstanding state rule of practice in order to obtain appellate review. Shortly before the Ohio Supreme Court determined in *State v. Humphries*, 51 Ohio St. 95 (1977), to limit retroactive application of its *Robinson* decision to those defendants who had objected to an erroneous instruction, the Supreme Court appeared to invite such treatment by state courts in dealing with constitutional errors.[3] If a state has this option in dealing with a constitutional requirement, surely it is not a violation of due process to so limit retroactive benefit of a decision which merely construes a state procedural statute.

The Supreme Court reminded us in *Patterson* of considerations which should guide federal courts in deciding habeas corpus cases involving the administration by states of their own criminal justice systems:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

432 U.S. at 201-02.

I would affirm the judgment of the district court.

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[3]*Humphries* was decided on July 20, 1977. The opinion in *Hankerson v. North Carolina*, issued June 17, 1977, contained the following footnote:

> [6]Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g.*, Fed. Rule Crim. Proc. 30.

Merritt, Circuit Judge, dissenting. On the merits of this case, I believe that the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists. But I also believe that Judge Kennedy's analysis of *Wainwright v. Sykes*, 433 U.S. 72 (1977) and footnote 8 in *Hankerson v. North Carolina*, 432 U.S. 233, 244 (1977) is correct and requires us to affirm the District Court without reaching the merits.

Kennedy, Circuit Judge, dissenting. Were I to reach the merits of petitioner's constitutional claim, I would concur with Judge Lively. However, I would affirm the District Court's denial of the writ of habeas corpus without reaching the merits, since I agree with the District Court that petitioner's claim does not fall within the "cause" and "prejudice" exception to the rule in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Petitioner objects to Ohio's failure to apply retroactively its determination that Ohio law removed from defendant the burden of proving self-defense by a preponderance of the evidence or, as the majority holds, its determination that Ohio law made the absence of self-defense an element of the crime of murder.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), the Supreme Court held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the state's definition of the offense with which the defendant is charged. *Hankerson v. North Carolina*, 432 U.S. 233 (1977), held that the rule established in *Mullaney* and *Winship* was to be applied retroactively.

Petitioner did not object to the erroneous jury instruction during his trial, and thus ran afoul of Ohio's contemporaneous objection rule. In *Wainwright*, the Supreme Court held that where failure to comply with a state's contemporaneous objection requirement precludes direct review of a constitutional issue, it likewise precludes federal habeas corpus review, absent a showing that defendant had "cause" not to object and that "prejudice" resulted from his not objecting. This failure to comply with the state's contemporaneous objection rule amounts to an independent and adequate state procedural ground for affirming the conviction with regard to that issue. *Wainwright, supra*, 433 U.S. at 81-82, 86-87. The majority in this case finds that petitioner had cause for the failure to object to the violation of *Mullaney* because *Mullaney* was unanticipated at the time of petitioner's trial.

The cause and prejudice exception to the *Wainwright* rule is not well-defined; in fact, there is little to guide the Court in its interpretation. *See Rachel v. Bordenkircher*, 590 F. 2d 200,

204 (6th Cir. 1978). However, when the Supreme Court in *Hankerson* made *Mullaney* retroactive, it observed that the resulting impact on the administration of justice would not be burdensome. The Court reasoned that if the validity of the burden-shifting instructions in cases of this type had been well settled, it would be unlikely that many defense lawyers would have made appropriate objections to those instructions. The Court then declared that

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson, 432 U.S. at 244 n. 8.

I believe, as the Fourth Circuit recently decided, that this language in *Hankerson* was intended to protect states whose rule might have violated *Mullaney* from a flood of new trials. *See Cole v. Stevenson*, No. 78-6211 (4th Cir., May 5, 1980) (en banc). If, as this Court holds, a change in interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the states' contemporaneous objection rules. I do not believe that the suggestion in *Hankerson* to the contrary can be so freely ignored.

Further, the trial in this case was held three months after *Mullaney* was decided, and more than five years after *In re Winship*. Although it may have been difficult to anticipate when the Ohio courts would recognize that their procedure may violate *Mullaney* and *Winship*, or the exact manner in which the rule of those cases would be applied, the rule itself was not new or unanticipated.

It is clear that Ohio applied its contemporaneous objection rule in this case. It is also clear that Ohio intends to apply the contemporaneous objection rule generally in burden of proof cases. *State v. Long*, 53 Ohio St. 2d 91, 372 N.E.2d 804 (1978). Thus, I would hold that petitioner does not fall within the cause and prejudice exception of *Wainwright*, and that federal habeas corpus review on this issue is precluded.

NO. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superintendent,
Respondent-Appellee

[FILED DEC. 18, 1980]

O R D E R

The opinion of the Court in the above-captioned cause, decided and filed December 12, 1980, shall be modified as follows:

In the first line listing the members of the en banc Court, "Engle" should read "Engel";

The dissenting opinion of Judge Lively, beginning on page 17 of the slip opinion, is joined in by Judge Engel.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,
vs.
TED ENGLE, Superindendent Chillicothe Correctional Institute
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

[DECIDED AND FILE FEB. 8, 1980]

Before: Celebreeze, Circuit Judge, and Phillips and Peck, Senior Circuit Judges.

Peck, Senior Circuit Judge, delivered the opinion of the Court, in which Phillips, Senior Circuit Judge, joined. Celebrezze, Circuit Judge, (pp.11-13) filed a separate concurring opinion.

Peck, Senior Circuit Judge. The principal issue in this appeal is whether the Due Process Clause limits the selective denial of retroactive benefits of a new statutory interpretation, where denial is based upon failure to comply with a State's contemporaneous objection rule.

In 1975, petitioner Lincoln Isaac was convicted by an Ohio jury of one count of aggravated assault. At his trial, appellant relied on Ohio's affirmative defense of self-defense. The trial court instructed the jury that defendant bore the burden of proving his affirmative defense by a preponderance of the evidence.[1] This charge accorded with the prevailing law in Ohio, and petitioner made no objection. Subsequently, the Supreme Court of Ohio held that the Ohio legislature had changed the burden of proof for all affirmative defenses in Ohio, including self-defense. Interpreting Ohio Revised Code Section 2901.05 (A),[2] enacted in 1974 (but amended in 1978; see p. 9 infra), the court held that when a defendant pleads the affirmative defense of self-defense, he has only the burden of

going forward with evidence sufficient to raise the defense, and does not have the burden of establishing the defense by a preponderance of the evidence. *State v. Robinson*, 47 Ohio St. 2d 103 (1976).

In the Ohio court of appeals, petitioner argued that the trial court's jury instruction was erroneous, citing *Robinson*. That court of appeals affirmed Isaac's conviction, holding that his failure to object at trial waived any error in the jury instructions. An appeal to the Ohio Supreme Court was dismissed *sua sponte* for want of a substantial constitutional question. *State v. Isaac*, No. 77-412 (Ohio Sup. Ct., July 20, 1977). On the same day that petitioner's appeal was dismissed, however, the Ohio Supreme Court, in another case, held its *Robinson* decision to be applicable retroactively to all criminal trials held after the effective date of the statute. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). However, despite that holding, the Court refused to extend the benefits of retroactivity to Humphries because of his failure to object to the erroneous jury charge at trial. *Id.* at 102.

After exhausting his state court remedies, Isaac turned to the federal courts for relief, filing a petition for a writ of habeas corpus, asserting that he was entitled to the retroactive application of *State v. Robinson, supra*, as a matter of federal constitutional law. The district court dismissed the petition on the grounds that appellant had shown neither cause for his failure to object to the jury instructions nor prejudice as a result of the faulty charge. This appeal followed.

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[1]The trial judge instructed the jury as follows:

> The burden of proving the defense of self-defense is upon the defendant. He must establish such defense by a preponderance of the evidence. Now a preponderance of the evidence is the greater weight of the evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence that is opposed to it . . . If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the defendant has not established such issue of self-defense. (Transcript at 227-228.)

[2]"Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." Ohio Rev. Code. Section 2901.05(A).

As a preliminary matter, we note that the Constitution does not ordinarily require the retroactive application of a new interpretation of a statute. *See, e.g., Halliday v. United States*, 394 U.S. 831 (1969). On the other hand, where the statute pertains to an affirmative defense and the statute is construed to make the absence of the affirmative defense an element of proof of the crime itself a different result is mandated. In such a case, the constitutional doctrine announced in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and in *In re Winship*, 397 U.S. 358 (1970), requiring the prosecution to prove every element of a crime beyond a reasonable doubt, has application. *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978), and the Due Process Clause requires that the new interpretation be applied retroactively. *Hankerson v. North Carolina*, 432 U.S. 233 (1977). In *State v. Humphries, supra*, the Ohio Supreme Court decided to apply *State v. Robinson, supra*, retroactively as a matter of state law.[3] Accordingly, we need not grapple with the question of whether Ohio was obligated to do so as a matter of due process.

In our view, the single issue in this appeal is whether the decision of the Supreme Court of Ohio to withhold from petitioner the benefits of Section 2901.05(A), as established in *State v. Robinson*, for failure to comply with Ohio's contemporaneous objection rule was a deprivation of due process.

The decision to apply a new rule retroactively or prospectively is essentially one of policy, and is thus a determination to be made by appropriate state action. Once the determination to give retroactive effect to a new rule has been made, however, the benefits of the right conferred may not be withheld arbitrarily. *See generally, American Ry. Express Co. v. Kentucky*, 273 U.S. 269 (1931); *City of Cincinnati v. Vester*, 33 F. 2d 242 (6th Cir.), *aff'd*, 281 U.S. 439 (1930).

Respondent insists that the criterion used by the Ohio

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[3]Paragraph four of the syllabus in *State v. Humphries* read: "The General Assembly enacted R.C. 2901.05 to be effective January 1, 1974. Every criminal trial held on and after that date is required to be conducted in accordance with the provisions of that section."

Supreme Court in *State v. Humphries, supra*, 51 Ohio St. 2d 95, at 102, to limit the application of *State v. Robinson* was approved by the Supreme Court of the United States in *Hankerson v. North Carolina, supra*. In *Hankerson*, the Supreme Court of North Carolina held that a jury instruction that imposed the burden of proving self-defense upon the defendant was violative of due process under the Supreme Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1974). *Hankerson* was tried before the date on which *Mullaney* was decided. Concluding that it was not required to apply *Mullaney v. Wilbur* retroactively to a conviction that occurred before the date on which the Supreme Court's decision was handed down, the North Carolina court affirmed Hankerson's conviction. The Supreme Court reversed. It held that where a new constitutional rule is designed " 'to overcome an aspect of a criminal trial that *substantially* impairs its truth-finding function,' " the rule must be applied retroactively. 432 U.S. at 243, *quoting Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972).

The language in *Hankerson, supra*, relied on by respondent in the case at bar, came in partial response to the state's contention that retroactivity would have a devastating effect on the administration of justice. To this argument, the Court replied in a footnote that a State "may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g.*, Fed. Rule Crim. Pro 30." 432 U.S. at 244 n. 8. Ohio has a similar rule.[4]

The footnote cited by respondent was *dictum*. The petitioner in *Hankerson*, like the appellant here, failed to object to the jury instructions at trial. The North Carolina Supreme Court chose to pass on the validity of the instructions, nevertheless. Thus, the question of whether a state may constitutionally utilize its procedureal rules to bar the application of a retroactive ruling was not before the Court.

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[4]Rule 30, Ohio Rules of Criminal Procedure, expressly provides that, "[a] party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict . . . stating specifically the matter to which he objects and the grounds of his objection." *See also State v. Glaros*, 170 Ohio St. 471 (1960).

This Court, of course, is not controlled by *dicta*. Moreover, we need not pass on the question of whether, as a general rule, defendants may be required to raise their objections to jury instructions at trial. We are confronted here with a specific factual situation in which we are required to decide whether the state court's decision in the instant case was arbitrary or capricious. Thus, the test to be applied on this appeal is whether the means selected by the Ohio Supreme Court in *Humphries, supra*, bear a real and substantial relation to the ends sought to be attained by the use of its procedural rule to deny the benefits of retroactivity to the petitioner. Therefore, we turn to the justification for Ohio's procedural rule that requires a defendant to challenge jury instructions at trial or not at all.

In *State v. Williams*, 51 Ohio St. 2d 112 (1977), *vacated in part sub nom. Williams v. Ohio*, 439 U.S. 955 (1978), handed down on the same day that petitioner's appeal was dismissed, the Supreme Court of Ohio, in paragraph one of the syllabus,[5] said:

> An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.

In the text of the *Williams* opinion, the court went on to say:

> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error. [citation omitted] *Id.* at 117.

Thus, it is clear that the end which the contemporaneous objection rule seeks to achieve is to make trial proceedings as

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[5]Under Ohio Law, only the points of law set out in the syllabus are considered to have the force of law, unless the opinion is per curiam. The statements made in the body of the opinion are the conclusions of the judge writing the opinion. *See, e.g., Haas v. State*, 103 Ohio St. 1 (1921).

error free as possible. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The rule does not assume that a trial court will always avoid or correct the error asserted; if it did, appellate courts would not be needed. But, as *State v. Williams, supra*, suggests, the rule does assume that some basis for the assertion of error exists, however tenuous, that can be discovered through due diligence of counsel and presented in good faith to the trial court for its consideration. Stated another way, the contemporaneous objection rule presupposes the contemporaneous existence of some legal principle that is applicable to the proceedings at trial.

In the present case, the principle that the defendant must bear the burden of proving the affirmative defense of self-defense was well-settled in Ohio prior to the enactment of Ohio Revised Code Section 2901.05(A). *See, e.g., Silvus v. The State*, 22 Ohio St. 90 (1871); *see also, State v. Seliskar*, 35 Ohio St. 2d 94 (1973), and cases cited therein. At the time of appellant's trial, no Ohio court had held or even indicated that the statute had modified the common law. The committee notes that accompanied the new statute reflected no alteration in existing law. Nor was the statute accompanied by a transition table, sometimes used to explain the effect of a new statute on prior law, including the date the new law is to be phased in and the old phased out. *See, e.g.*, Ohio Rev. Code Ann. Sections 2903.01 and 2929.04 (Page 1975). The standard Ohio Jury Instructions, which placed the burden of proving the affirmative defense of self-defense by a preponderance of the evidence on the defendant, remained unchanged after the enactment of Section 2901.05(A). *4 O.J.I. Criminal* 409.60 (1970 ed.). Further, the leading treatises perceived no variation from prior law. 1 *Anderson's Ohio Criminal Practice and Procedure* Section 52.15 (1975 ed.); 1 O. Schrader and L. Katz, *Ohio Criminal Law Practice*, Tit. 29 at 14 (1974 ed.). Finally, the Ohio Supreme Court gave credence to the view that Section 2901.05 (A) had not altered the common law when, in *State v. Rogers*, 43 Ohio St. 2d 28 (1975), *cert. denied*, 423 U.S. 1061 (1976), it said: "[S]elf defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* [1973], 35 Ohio St. 2d 95, 96). . . ." *Id.* at 30. With respect to Section 2901.05, the Court further stated: "The defense of using reasonable force to effect a citizen arrest . . . is . . . an affirmative defense (R.C.

2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused R.C. 2901.05[A] to prove that issue by a preponderance of the evidence. *See State v. Seliskar, supra,* (35 Ohio St. 2d 95)." Id. at 33.

The language quoted from *Rogers* was *dictim.* Therefore, at the time of petitioner's trial, the question of who must bear the burden of proving the affirmative defense of self-defense had not been definitively answered. Nevertheless, we believe the decision to apply *State v. Robinson, supra,* retroactively is strong evidence that the Ohio Supreme Court recognized that its *Robinson* decision had changed the law substantially.

We hold that in these circumstances, the failure to object at trial cannot bar the petitioner from the retroactive application of *State v. Robinson, supra.*

As previously stated, the contemporaneous objection rule presupposes the existence of a legal principle capable of being advanced to support an objection. Yet, in the case at bar, every recognized authority on affirmative defenses in Ohio as well as *dictum* from the Ohio Supreme Court reinforced the propriety of the trial court's charge to the jury. Thus, existing law provided no basis for an objection to the court's jury instructions at the time of trial. To require an objection in these circumstances would be to require the doing of a vain act. We are, therefore, led to the conclusion that there was no real or substantial relation between the use of the contemporaneous objection rule as a bar to retroactivity in the instant case and the rule's avowed purpose. In *O'Connor v. Ohio,* 385 U.S. 92 (1966), the Supreme Court held that the failure to object at trial to a practice that Ohio had long allowed could not deprive the petitioner of his right to attack that practice in the state courts following its subsequent invalidation by the Supreme Court. The Court reasoned that defendants cannot be charged with anticipating future decisions invalidating past practices. Though *O'Connor* involved the attempted assertion of a federal claim, we believe the logic of that decision to be equally persuasive in the context of the present case.

The district court's reliance on *Wainwright v. Sykes,* 433 U.S. 72 (1977), to dismiss appellant's petition was misplaced. Insofar as petitioner claims that he was entitled to attack

collaterally the constitutionality of the jury instructions on the basis of *Mullaney v. Wilbur, supra,* 421 U.S. 684, despite his failure to preserve properly the issue at his state trial, *Wainwright v. Sykes* provides the initial test for federal habeas review. Absent a showing of cause for the noncompliance with Ohio's contemporaneous objection rule and some showing of actual prejudice, federal habeas corpus review of his *Mullaney* claim is barred. *See, e.g., Berrier v. Egeler,* 583 F. 2d 515 (6th Cir.), *cert. denied,* 439 U.S. 955 (1978). It was proper for the district court to apply the cause and prejudice test to this branch of petitioner's claim, though we express no opinion as to the soundness of its conclusion. Having applied the test, however, the court's task was only half finished.

The major thrust of petitioner's claim was, and is, not directed to the constitutionality of the jury instruction itself; but rather, it centers upon and challenges the constitutionality of the Ohio Supreme Court's selective application of its *State v. Robinson* decision while petitioner's conviction was still pending on review in the state courts. *Wainwright v. Sykes, supra,* is not applicable to this second prong of appellant's petition.

Since we find petitioner's selective retroactivity claim to be meritorious, we do not deem it necessary to address appellant's further assertion that the jury instructions at his trial were unconstitutional. Consequently, it is also unnecessary to pass upon the question of whether Isaac established cause and prejudice as a predicate to habeas review of that latter claim.

In our disposition of this case we are not unmindful of the amendment by the Ohio General Assembly of Ohio R.C. Section 2901.05(A), effective November 1, 1978. That section again requires affirmative defenses to be established by a preponderance of the evidence. If this section were to have application in any retrial which might result from our holding, that conclusion might be considered senseless since on retrial the pertinent jury instruction would be identical to that given at the original trial. However, it is apparent that any such retrial would not fall under the purview of amended section 2901.05(A) because such procedure would clearly be impermissible on *ex post facto* grounds. U.S. Const., art. I, Section 10, cl. 1. *See United States v. Williams,* 475 F. 2d 355 (D.C. Cir. 1973), and cases

therein cited.[6] This circumstances would require, in our view, an instruction to the jury that the raising of the affirmative defense of self-defense does not relieve the state of its obligation of proving every element of the offense beyond a reasonable doubt and that the defendant does not bear the burden of proving such defense by a preponderance of the evidence.

The judgment of the district court is reversed and the case is remanded with directions to grant a writ of habeas corpus to the petitioner unless the State of Ohio shall grant him a new trial within a reasonable time to be fixed by the district court.

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[6] "Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender [is *ex post facto*]." *Calder v. Bull*, 3 U.S. 305, 309, 3 Dall. 386, 390 (1798). "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount of degree, than was required when the offense was committed, ought, in respect of that offense, to be obnoxious to the constitutional inhibition upon *ex post facto* laws." *Mallett v. North Carolina*, 181 U.S. 589, 595 (1900), *quoting Hopt. v. Utah*, 110 U.S. 574 (1884); *see also Landay v. United States*, 108 F. 2d 698, 705 (6th Cir. 1939). "[T]he legislature may not, under the guise of establishing modes of procedure . . . violate the accepted principles that protect an accused person against *ex post facto* enactments." 181 U.S. at 596. *See also Malloy v. South Carolina*, 237 U.S. 180 (1915); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Hopt v. Utah*, 110 U.S. 574 (1884); *Kring v. Missouri*, 107 U.S. (7 Otto) 221 (1883); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867); *Frisby v. United States*, 38 App. D.C. 22 (1912). *See also, generally*, Croseky, The True Meaning of the Constitutional Provision of Ex Post Facto Laws, 14 U.Chi.L.Rev. 539 (1947).

Celebrezze, J., concurring.

The primary focus in this case is whether Ohio may, consistent with due process, utilize its contemporaneous objection rule to bar retroactive effect to its *Robinson* decision. Having concluded in *State v. Humphries*, 51 Ohio St. 2d 95 (1977), that *Robinson* should apply retrospectively, Ohio now attempts to deny Isaac the benefits of the retroactive application of *Robinson* because his counsel failed to object at trial to the jury instructions on the issue of self-defense.

In analyzing Ohio's failure to accord Isaac the retroactive benefit of *Robinson*, the majority employs a standard of review which seeks to discover some rational relationship between the purposes that Ohio's contemporaneous objection rule is designed to serve and the reason for which that rule was involked in this case. The majority concludes that the utilization of the contemporaneous objection rule to bar retroactive application of *Robinson* is an arbitrary exercise of state procedural law which constitutes a deprivation of due process. This is so, the majority reasons, because the contemporaneous objection rule presupposes the existence of a palpable objection, and here Isaac's counsel had no valid reason to object to the trial judge's instructions on the issue of self-defense. To the contrary, however, an objection based on the constitutional infirmity subsequently isolated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) was always available; that is, Isaac could have objected that the instructions placed upon him the burden of proof in violation of the principles of due process expressed in *In re Winship*, 397 U.S. 358, 364 (1970).

I write separately because I believe that such speculation as to whether Isaac's counsel could or should have raised an objection at trial is too hypothetical a predicate for federal interdiction of a state procedural rule. It is an equally uncertain ground for denying Isaac a new trial in which the burden of proof as defined by *Robinson* applies. Admittedly, federal interference with Ohio's contemporaneous objection rule should proceed cautiously in light of the Supreme Court's deference to the application of state procedural rules. *See e.g. Wainwright v. Sykes*, 433 U.S. 72 (1977). This deference takes on an added dimension in light of Justice White's observation in *Hankerson*

v. North Carolina, 432 U.S. 233, 244 n. 8 (1977), that a state might be able to use its procedural rules to insulate past convictions from collateral attack.[1] From a legal technician's viewpoint, this dicta offers a viable avenue for avoiding the full impact of *Mullaney*.

Although i believe that, despite *Mullaney v. Wilbur*, it is constitutionally permissible for a state to treat self-defense as an affirmative defense that the prosecution need not negate beyond a reasonable doubt, *see Patterson v. New York*, 433 U.S. 197, 210 (1977); *Berrier v. Egeler*, 583 F. 2d 515, 524 (6th Cir. 1978) (Engel, J., dissenting), *cert. denied*, 439 U.S. 955; *cf. Hankerson v. North Carolina*, 432 U.S. 233, 245 (whether due process requires the prosecution to disprove self-defense beyond a reasonable doubt under North Carolina law left undecided), the Ohio Supreme Court has interpreted O.R.C. Section 2901.05(A) so as to place upon the defendant only the burden of going forward with evidence sufficient to raise the defense. *State v. Robinson*, 47 Ohio St. 2d 103 (1976).

As expressed by a unanimous Court in *Hankerson*, the definition and placement of the burden of proof is a fundamental aspect of the truth-finding process of a criminal trial. *Hankerson, supra* at 243-44. *See also Winship* at 370-72 (Harlan, J., concurring); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *see generally, Jefferies & Stephen, Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 325 (1979). Protecting that truth-finding function must take precedence over a state's procedural concerns expressed in an contemporaneous objection rule. As such, denying to a defendant a trial under what the Ohio Supreme Court has concluded to be the proper allocation of the burden of proof amounts to a denial of due process of law.

Redefining the burden of proof placed upon a defendant, whether it be by a new constitutional rule or by a new statutory

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[1]Were the challenge here directed to the substance of the jury instructions, use of a contemporaneous objection rule to preclude habeas corpus review might be justified. *See Frazier v. Weatherholtz*, 572 F.2d 992, 997-98 (4th Cir. 1978). *See also United States v. Jackson*, 569 F.2d 1003, 1008-09 (7th Cir. 1978).

interpretation of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function. In such situations retroactive application is imperative. *Hankerson, supra,* at 241 quoting *Ivan V. v. City of New York,* 407 U.S. 203, 204-05 (1972).

Since the Ohio Supreme Court's decision in *Robinson* significantly effects the burden of proof to be placed upon a defendant, due process requires that Isaac receive the benefits of that court's interpretation. Accordingly, I concur in the judgment of the court awarding the writ.

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINCOLN ISAAC,
Petitioner-Appellant,

vs.

TED ENGLE, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER
[FILED MAR. 24, 1980]

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and the case will be scheduled for oral argument during the June, 1980 session.

ENTERED BY ORDER OF THE COURT

Signed By
John P. Hehman, Clerk

No. 78-3488

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 31, 1980]

LINCOLN ISSAC,
Petitioner-Appellant,

vs.

TED ENGLE, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. C-2-78-278

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED JUN. 26, 1978]

LINCOLN ISAAC
vs.
TED ENGLE SUPERINTENDENT

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the petition is without merit, and it is DENIED. This action is hereby DISMISSED. Judgment is entered for the respondent.

Signed by

John D. Lyter, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C-2-78-278

[FILED JUN. 26, 1978]

LINCOLN ISAAC,

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

OPINION AND ORDER

Petitioner, a State prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241 (c) (3). This matter is before the Court on the petition, return of writ, and briefs and exhibits of the parties.

Petitioner was indicted by the April, 1975 Term of the Pickaway County, Ohio Grand Jury for felonious assault in violation of R.C. 2903.11. He was tried to a jury which returned a verdict of guilty of aggravated assault in violation of R.C. 2903.12. The trial court sentenced petitioner to a term of six (6) months to five (5) years imprisonment.

Petitioner alleges that he is in the custody of respondent in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that:

> The trial court charged petitioner had the burden of proving self-defense. After conviction and during the first appeal the Ohio Supreme Court declared the instructions to be prejudicial error under *Robinson*. This case was immediately raised to the Appellate Court. They held any error was waived. The Ohio Supreme Court then held *Robinson* retroactive. Petitioner had raised retroactivity in its leave to appeal and was denied leave to appeal the same day *Humphries* was declaring retroactivity. The Ohio Supreme Court refuses to give relief despite its own pronouncement. The holding of the Court is contrary to the Supreme Court of the United States in regard to proving self-defense.

In the Fourth Appellate District Court of Appeals for Pickaway County, Ohio petitioner raised the following relevant claim for relief:

> The Court committed prejudicial error by instructing the jury that the defendant had to prove the affirmative defense of self defense by a preponderance of the evidence.

The Court of Appeals rejected the assignments of error with the following ruling:

> In support of his argument Defendant-Appellant cites *State* v. *Robinson*, 47 O.S. 2d 103, . . . a recently decided Ohio Supreme Court case, eliminating the degree of proof referred to above. A review of the transcript reveals that in his opening statement and closing statement, Defendant's counsel stated to the jury that the burden of proof was by a "preponderance of the evidence." Further, Defendant-Appellant made no objection to that portion of the charge dealing with that burden of proof, as required for review under the terms of Ohio Rules of Criminal Procedure, Rule 30. The failure to make such an objection waives any error not called to the attention of the trial court. As noted by Plaintiff-Appellee, see also, *State* v. *Glaros*, 170 O.S. 471, *State* v. *Slone*, 45 O. App. 2d 24. The fifth assignment of error is not well taken and overruled; the verdict of the jury is affirmed.

Petitioner then filed a motion for leave to appeal to the Supreme Court of Ohio, alleging the following relevant errors:

> 3. A court instruction placing the burden of proof of self-defense on defendant is plain error under Criminal Rule 52(d) and a failure to object will bar raising the Court's instruction for the first time on appeal.
>
> 4. It is denial of the due process clause of the United States Constitution to place the burden of proof of self-defense on the defendant and failure to make a timely objection does not bar the defendant from asserting an error for the first time on appeal the Court's instruction placing the burden of proof upon him.

Respondent contends that petitioner has not exhausted his available State court remedies by fairly presenting his federal constitutional claim for relief to the appropriate State courts. 28 U.S.C. Section 2254 (b), (c). *Picard* v. *Connor*, 404 U.S. 270, 275-276 (1971). Petitioner did not raise his federal constitutional claim for relief in the trial court. On the present record, it

is unclear whether he raised a federal constitutional claim for relief in the Court of Appeals for Pickaway County, Ohio. The claim for relief presented to the Court of Appeals was based upon the Supreme Court of Ohio's decision in *State* v. *Robinson*, 47 Ohio St. 2d 103 (1976). *Robinson* did not decide the federal constitutional question of whether, under Ohio law, placing the burden of proving the affirmative defense of self-defense upon the defendant violates the defendant's due process right to have the State prove each essential element of the crime beyond a reasonable doubt. See, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Patterson* v. *New York*, 45 U.S.L.W., 4708, 4711-4713 (1977). The Court in *Robinson* held that as a matter of State law R.C. 2901.05(A) did not put the burden of proof of the affirmative defense of self-defense upon the defendant. Petitioner's brief in the Court of Appeals is not a part of the record in this Court, so the Court is unable to say whether petitioner fairly presented his federal due process claim to the Court of Appeals. The mere invocation of *Robinson* does not necessarily mean the federal claim was presented.

The Court need not determine whether petitioner has fairly presented his federal constitutional question to the appropriate State courts because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court. *State* v. *Long*, 53 Ohio St. 2d 91, 95-97 (1978); *State* v. *Humphries*, 51 Ohio St. 2d at 103. The State court procedural waiver bars presentation of the federal constitutional claim in habeas corpus unless the petitioner makes a showing of cause and actual prejudice. *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976). Petitioner has not made a showing of either cause or actual prejudice. Accordingly, the Court HOLDS that he has waived his federal constitutional claim.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit, and it is DENIED. This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

SIGNED BY
ROBERT M. DUNCAN, JUDGE
UNITED STATES DISTRICT COURT

No. 79-3153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH L. BELL,
Petitioner-Appellant,
v.
E.P. PERINI, Superintendent,
Marion Correctional Institute,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed December 12, 1980

Before: Merritt, Brown and Martin, Circuit Judges.

Bailey Brown, Circuit Judge, delivered the opinion of the Court in which Martin, Circuit Judge, joined. Merritt, Circuit Judge, (p. 7) filed a separate dissenting opinion.

Bailey Brown, Circuit Judge. The petitioner, Kenneth L. Bell, appeals from the district court's denial of his petition for a writ of habeas corpus. Bell contends that the jury instructions given at his state criminal trial in Ohio shifted to him, in violation of due process, the burden of disproving an element of the offense for which he was indicted. More specifically, Bell contends that at his murder trial he was denied due process because the jury was instructed that the burden was on him to prove self-defense by a preponderance of the evidence. In resolving this contention, we first must review the development of Ohio law in this area in the recent past.

I.

Prior to 1974, Ohio followed the traditional common law rule that the defendant in a criminal case not only had the burden of going forward with evidence in support of an affirmative defense but also had the burden of proving such affirmative defense by a preponderance of the evidence. *State* v. *Seliskar*, 35 Ohio St. 2d 95 (1973). As of January 1, 1974, however, a new statutory provision became effective. That provision, codified as Ohio Revised Code 2901.05(A), stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Apparently, R.C. 2901.05(A) was not initially considered to effect any change in the previous common law rule. In fact, the Ohio Supreme Court, as late as 1975, reaffirmed at least in a dictum the principle that a defendant must bear the burden of proving affirmative defenses by a preponderance of the evidence[1] *State v. Rogers*, 43 Ohio St. 2d 28 (1975).

The petitioner in this case was indicted in 1975 for aggravated murder. At his trial, Bell testified that he had acted in self-defense. The trial court instructed the jury without objection by Bell that it was incumbent on Bell to demonstrate self-defense by a preponderance of the evidence. The jury found Bell guilty of murder. He was sentenced to a term of fifteen years to life imprisonment.

Bell appealed his conviction to the Cuyahoga County Court of Appeals. That appeal, however, did not question the validity of the jury instruction concerning self-defense. In April, 1976, the Court of Appeals affirmed Bell's conviction.

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[1] In *Rogers*, the Ohio Supreme Court in dictum stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse or justification, and is, therefore, an affirmative defense (R.C. 2901.05[C][2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence. See *State v. Seliskar, supra*, 35 Ohio St. 2d 95, 298 N.E. 2d 582.

In July, 1976, the Supreme Court of Ohio, in *State v. Robinson*, 47 Ohio St. 2d 103 (1976), held that R.C. 2901.05 (A) had substantially altered the previously accepted common law rule defining the burden of proof in criminal cases. The court construed R.C. 2901.05 (A) to require that a defendant go forward with sufficient evidence to raise the affirmative defense but that if the defendant presented such evidence, the prosecution then must demonstrate beyond a reasonable doubt the guilt of the defendant even to the extent of disproving such affirmative defense. Interpreting R.C. 2901.05 (A) in this manner, the Ohio Supreme Court held that any jury instruction placing the burden of proving an affirmative defense on the defendant constituted prejudicial error.

Nonetheless, Bell's conviction was subsequently affirmed by the Ohio Supreme Court when it dismissed Bell's appeal for lack of a substantial constitutional question. The question of the validity of the jury instructions was not presented to or considered by the court in rendering its decision.

In 1977, the Ohio Supreme Court determined as a matter of state law that *State v. Robinson, supra*, should be applied retroactively to all criminal cases tried subsequent to January 1, 1974. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). In *Humphries*, however, the court also held that the failure to object to a jury instruction effectively waived any claim of error based on Robinson.[2]

In 1978, Bell filed a petition for a writ of habeas corpus in the proper federal court challenging the constitutional validity of the jury instructions.[3] The district court held that the jury instructions imposing on Bell the burden of proving self-defense were consistent with the Ohio law at the time of Bell's trial. It also concluded, relying on *Patterson v. New York*, 432 U.S. 197

[2]Effective November 1, 1978, R.C. 2901.05(A) was amended to adopt once again the common law rule that the defendant has the burden of proving affirmative defenses by a preponderance of the evidence.

[3]The district court determined that, since Bell has no available state remedy by which he could raise the issue presented here, he has exhausted his remedies. Respondent does not challenge this ruling.

(1977), that a state could constitutionally so impose the burden of proving self-defense on a defendant. The district court also held that Bell had no due process right to the retroactive application to his case of the decision in *Robinson*. Accordingly, the district court denied the petition, and Bell brought the instant appeal.

II.

The appeal in this court in Isaac v. Engle, F. 2d (6th Cir. 1980) raised essentially the same issue as is raised here. The habeas petitioner there, Lincoln Isaac, was convicted of felonious assault in Ohio in 1975 while Ohio Revised Code Section 2901.05(A) was in effect. At trial, Isaac had relied on a defense of self-defense, offering sufficient evidence to create such issue, and the trial court instructed the jury, without objection from Isaac, that the burden was on Isaac to prove self-defense by a preponderance of the evidence. Isaac, on appeal, relied on *State v. Robinson, supra*, in which the Supreme Court of Ohio had held that Section 2901.05 (A) had effectively placed the burden on the state, when the issue is effectively raised, of proving absence of self-defense beyond a reasonabale doubt. The Ohio Court of Appeals held that Isaac had waived his claim of error in the jury instruction by failing to object thereto, citing an Ohio procedural rule. The Ohio Supreme Court dismissed Isaac's appeal for lack of a substantial constitutional question. On the same day it dismissed Isaac's appeal, it decided in *State v. Humphries, supra*, that *Robinson* would be given retroactive effect but that, relying on the Ohio contemporaneous objection rule, held that failure to object to the charge to the jury would constitute a waiver.

Isaac sought habeas relief in federal district court, but such relief was denied on the ground that Isaac had not shown "cause" for his failure to object to the charge and "prejudice" as a result of such charge as is required by *Wainwright v. Sykes*, 433 U.S. 72 (1977).

On appeal, in an *en banc* decision,[4] a majority of this court

[4]The panel opinion in *Isaac v. Engle* is reported in F. 2d at

voted to reverse the district court and to grant relief to Isaac. The majority were of the opinion that Isaac had shown "cause," as is required by *Wainwright*, since, at the time of his trial, Isaac neither knew nor reasonably could have known that the charge to the jury with respect to burden of proof as to self-defense was contrary to Ohio law or that such charge constituted a denial of federal due process. The majority also held that Isaac had shown actual "prejudice" since Isaac had by his testimony made self-defense a live issue in his trial. The plurality opinion in *Isaac*, authored by the writer of this opinion, held that Isaac had been denied federal due process by placing on him, contrary to Ohio law, the burden of proving self-defense. The plurality opinion reached this result on the theory that, since Ohio had by statute assumed the burden of proving absence of self-defense, placing such burden on Isaac was, for practical purposes, the the equivalent of placing on Isaac the burden of proving the absence of an element of the crime of felonious assault. *See: In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *Patterson v. New York*, 432 U.S. 197 (1977). In opinions concurring in the result, Chief Judge Edwards and Judge Jones were of the opinion that, in view of the definition of felonious assault in the Ohio statute, absence of self-defense is an element of the crime that federal due process requires that the state prove.

III.

We believe that Bell, in the instant case, has likewise shown "cause" and "prejudice" as is required by *Wainwright* for the reasons stated in the plurality opinion in *Isaac*. We further believe that Bell was denied federal due process for the reasons stated in the plurality opinion in *Isaac*. Lastly, we believe that, for the reasons stated in the plurality opinion in *Isaac*, Bell is entitled to jury instructions that are consistent with Ohio law in 1975 as construed in *Robinson, supra*.

The judgment of the district court is reversed and the case is remanded. The district court is directed to order that petitioner be released from custody unless Ohio chooses to retry him within a reasonable time to be determined by the district court.

Merritt, Dissenting. I dissent from the opinion of the Court for the same reasons expressed in my dissenting opinion in *Isaac v. Engle*, F. 2d (6th Cir. 1980). The basic reason expressed there was that Ohio's contemporaneous objection rule provides an independent state ground for the state court's decision under *Wainwright v. Sykes*, 433 U.S. 72 (1977). That same reasoning applies to the instant case.

No. 79-3153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 31, 1980]

KENNETH L. BELL,
Petitioner-Appellant,

vs.

E.P. PERINI, SUPERINTENDENT,
MARION CORRECTIONAL INSTITUTE,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Civil Action File No. C 78-343

[FILED DEC. 26, 1978]

KENNETH L. BELL
vs.
E.P. PERINI, Supt.

JUDGMENT

This action came for trial (hearing) before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues have been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged petition dismissed.

Signed by
James S. Gallas

No. C 78-343

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN D!STRICT OF OHIO
WESTERN DIVISION

[FILED DEC. 26, 1978]

KENNETH L. BELL,

Petitioner,

vs.

E.P. PERINI, Supt.,

Respondent.

OPINION AND ORDER

WALINSKI, J:

This cause came to be heard on a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. Section 2254. Petitioner presently is incarcerated in respondent's custody at the Marion Correctional Facility, Marion, Ohio, where he is serving a sentence of fifteen years to life imposed by the Cuyahoga County Court of Common Pleas. Petitioner's sentence was imposed on April 18, 1975, pursuant to a jury determination that he was not guilty of Aggravated Murder, the indicted crime, but guilty of a lesser offense of Murder, a violation of Ohio Revised Code Section 2903.02. Petitioner appealed his conviction to the Cuyahoga County Court of Appeals where he urged five assignments of error. On April 8, 1975, the court overruled each of petitioner's claims and affirmed the conviction. An appeal to the Ohio Supreme Court was dismissed *sua sponte* in September, 1976, for want of a substantial constitutional question.

Petitioner then brought the instant action in habeas corpus. Petitioner claims, respondent acknowledges, and this Court so

finds that petitioner has exhausted his state remedies.[1] The sole question presented is whether the trial judge's instruction to the jury that petitioner must prove self-defense by a preponderance of the evidence was a violation of due process.

Petitioner does not now challenge the correctness of the instruction with respect to the elements of self-defense. Petitioner further admits that the charge reflected Ohio practice as it then existed concerning the burden of proof and which party must prove the elements of the defense.[2] *See State v. Sekiskar*, 35 Ohio St. 2d 95 (1973); *State v. Rogers*, 43 Ohio St. 2d 28 (1975), *cert. denied*, 423 U.S. 1061 (1976). *See generally* Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 Ohio St. L.J. 828 (1975). Relying principally on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), petitioner claims, however, that Ohio practice was in conflict with the requirements of due process.[3]

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[1]It does not appear that petitioner has ever raised in the courts of Ohio the issue he now raises in this Court. Nonetheless, the Court is not aware of any presently available state remedy where petitioner could yet present to the state courts this issue. *See Riley v. Havener*, 391 F. Supp. 117 (N.D. Ohio 1974). Moreover, this Court construes respondent's silence with respect to the issue of "exhaustion" and respondent's argument on the merits (or more appropriately, his quoting three paragraphs from *Patterson v. New York*, 432 U.S. 197 (1977) as proof that petitioner's failure to raise the issue was not a "deliberate bypass." *Fay v. Noia*, 372 U.S. 341 (1963); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

[2]Under Ohio Revised Code Section 2901.05(A):

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Subsequent to petitioner's trial, this provision has been interpreted to remove from a defendant the burden of proving an affirmative defense. *See State v. Robinson*, 47 Ohio St. 2d 103 (1976); *State v. Chase*, 55 Ohio St. 2d 237 (1978); *State v. Abner*, 55 Ohio St. 2d 251 (1978).

[3]For reasons best known to respondent, the Court does not have a transcript of petitioner's trial. As such, the Court emphasizes that the issue decided in this Opinion is simply whether it was unconstitutional to place on petitioner the burden of proving self-defense by a preponderance of the evidence. Thus, this decision in no way affects a decision that someday may have to be made with respect to any other issue concerning the judge's instructions. Should petitioner raise such a claim in a subsequent petition, the Court trusts that respondent will see fit to provide the Court with the transcript it ought to have provided in the instant petition.

The Supreme Court held in *In re Winship*, 397 U.S. 358 (1970), that due process requires the state to prove beyond a reasonable doubt all elements of the offense with which a defendant is charged. Drawling upon *Winship*, the Court, in *Mullaney v. Wilbur, supra*, found constitutionally invalid a Maine homicide rule that required the accused to demonstrate by a preponderance of evidence that he acted in the heat of passion before he could be convicted of manslaughter instead of murder. More specifically, the Court found that under Maine law absence of provocation was a necessary element of murder, and, as such, the state must prove it beyond reasonable doubt once the issue has been properly raised. *Mullaney v. Wilbur, supra*, at 703-04.

To be sure, there is some dicta in *Mullaney* that suggests the states cannot constitutionally place the burden of proving any affirmative defense on a criminal defendant. That such dicta was intended as a constitutional standard, however, was specifically rejected in *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* involved a New York procedure permitting a defendant to assert as an affirmative defense "extreme emotional disturbance", which is proven by a preponderance of the evidence, reduces the offense from murder to manslaughter. In upholding the New York scheme, the Court noted:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Patterson v. New York, supra*, at 201-02 (citations omitted).

The fundamental principle which limits the otherwise wide latitude a state has in regulating the enforcement of its criminal law is that "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon

proof of the other elements of the offense." *Patterson v. New York, supra,* at 215. *See also id.* at 206-07, 210, 211 n. 12. The procedure involved in *Mullaney,* therefore, was unconstitutional because it required a defendant to negate an essential element of the crime. *Patterson v. New York, supra,* at 215. On the other hand, the defense involved in *Patterson* was a true affirmative defense—a defense that instead of negating an element of the crime offers an excuse. *Patterson v. New York, supra,* at 206-07.

The Court notes that the issue presented in the instant petition—whether a defendant can constitutionally be made to carry the burden of proving self-defense—is a question the Supreme Court specifically refused to answer in *Hankerson v. North Carolina,* 432 U.S. 233 (1977). In view of *Patterson,* the Court doubts that the constitutionality of this issue can be answered removed from the context of a particular jurisdiction's substantive law. But whatever the constitutionality of the practice may be elsewhere, the Court believes that Ohio practice, as it existed at the time of petitioner's trial, was not "fundamentally unfair."

Petitioner was convicted of murder, which Ohio Revised Code Section 2903.02 (A) defines as (1) purposely[4] (2) causing (3) the death (4) of another. The prosecution must prove all these elements beyond a reasonable doubt before a defendant can be convicted. No other elements are presumed or inferred. By virtue of its common law, Ohio, at least at the time of petitioner's trial, exused what otherwise would be murder if the defendant could prove self-defense by a preponderance of the evidence.

Unlike the defense involved in *Mullaney,* however, evidence supporting a defendant's claim of self-defense "bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney v. Wilbur,*

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[4]Section 2901.22(a) of the Ohio Revised Code defines "purposely" as follows:

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

supra, at 706 (Rehnquist, J., concurring). When petitioner was convicted, self-defense in Ohio was a true affirmative defense like the defense involved in *Patterson* and the insanity defense involved in *Leland v. Oregon*, 343 U.S. 790 (1952). Instead of negating an element of the crime, the defense admitted the commission of the act charged with the necessary mental element but sought to avoid the consequences by showing a lawful excuse or justification. In this sense the defense was likened to the common law concept of confession and avoidance. *See* Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilbur*, 36 Ohio St. L.J. 828, 840-41 (1975); 27 O. Jr. 2d, Homicide Section 89 at 630.

As the Court in *Patterson* noted:

> The Due Process Clause, as we see it does not put [the States] to the choice of abandoning [affirmative] defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within [their] constitutional powers to sanction by substantial punishment.

Patterson v. New York, *supra*, at 207-08. Due process, however, does require the state to prove every element of the crime beyond a reasonable doubt. Thus, a procedure that allows a defendant to prevail in his "affirmative defense" only if he negates a necessary element of the crime by a preponderance of the evidence unconstitutionally puts the state's burden on the defendant. But in Ohio, proof of self-defense did not negate or otherwise bear a necessary relationship with any element of the crime the state had to prove beyond a reasonable doubt in order to convict. As such, the Court concludes that Ohio's decision to put the burden of proving the defense on petitioner did not unconstitutionally shift to petitioner the burden of proof. Due process was satisfied when the state proved beyond a reasonable doubt that petitioner purposely caused the death of another.

Petitioner contends, however, that this line of reasoning is in conflict with *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), which held that the petitioner was denied due process when a Michigan trial court instructed the jury that the burden of proving self-defense was on the petitioner. But the procedure challenged in the instant petition is fundamentally different from the

procedure involved in *Berrier;* namely, *Berrier* dealt with a situation in which absence of self-defense was an essential element of the crime. *See Berrier v. Egeler, supra,* at 521. *Berrier* did not hold that due process always requires the prosecution to prove the absence of self-defense, or to phrase it differently, that a defendant can never be saddled with the burden of persuasion. *See Berrier v. Egeler, supra,* at 524 (Engel, concurring). Rather, *Berrier* simply stands for the proposition that the state must prove the absence of self-defense once the state has made the absence of self-defense an element of the crime. As previously mentioned, absence of self-defense was not an element of the crime in Ohio when petitioner was convicted, nor was proof of the defense in any way related to any fact the prosecution was required to prove.

For the foregoing reasons,

IT IS ORDERED that the instant petition for a writ of habeas corpus must be and hereby is denied.

Signed by
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

December 19, 1978.

No. C 78-343

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[FILED JAN. 23, 1979]

KENNETH L. BELL,

Petitioner,

vs.

E.P. PERINI, Supt.,

Respondent.

OPINION AND ORDER

WALINSKI, J:

This cause came to be heard on petitioner's motion for reconsideration. By Order filed December 26, 1978, the Court denied the petition for a writ of habeas corpus as to the sole ground for relief presented. More specifically, the Court held that it was not unconstitutional for the State to place on petitioner the burden of proving self-defense by a preponderance of the evidence since "proof of self-defense did not negate or otherwise bear a necessary relationship with any element of the crime which the State had to prove beyond a reasonable doubt in order to convict." Petitioner now states that the Court misunderstood the "real issue" presented in his earlier petition. Conceding for the sake of argument the constitutionality of a procedure which places the burden of proving an affirmative defense on the defendant, plaintiff maintains that Ohio did not have such a procedure at the time of his trial.

Petitioner's argument is based on Ohio Revised Code Section 2901.05 (A), which provides:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

In *State v. Robinson*, 47 Ohio St. 2d 103 (1976), the Ohio Supreme Court held that this provision requires the State to prove the absence of self-defense once a defendant has raised the issue by going forward with evidence suggesting self-defense But at the time of petitioner's trial, the meaning which the Court in *Robinson* attached to Ohio Revised Code Section 2901.05(A) was not, as petitioner contends, the law in Ohio. In every meaningful sense, the law was that Section 2901.05 (A) had not altered Ohio's common law practice of placing on a defendant the burden of proving an affirmative defense by a preponderance of the evidence.[1]

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[1]At the time of petitioner's trial no court in Ohio (at least, no court in a written opinion) had held or even indicated that Ohio Revised Code Section 2901.05(A) had modified the common law. The leading treatises certainly saw no change in the law. 1 *Anderson's Ohio Criminal Practice and Procedure* Section 52.15 (1975 ed.); 1 O. Schrader and L. Katz, *Ohio Criminal Law Practice*, Titl. 29 at 14 (1974 ed.). The Ohio Supreme Court gave credence to this view when, in *State v. Rogers*, 43 Ohio St. 2d 28 (1975), it said:

> [S]elf-defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* [1973], 35 Ohio St. 2d 95, 96)

Id. at 30. With respect to Section 2901.05, the Court further stated:

> The defense of using reasonable force to effect a citizen arrest *** is *** an affirmative defense (R.C. 2901.05[C] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A] *to prove that issue by a preponderance of the evidence. See State v. Seliskar, supra* (35 Ohio St. 2d 95). (*Emphasis added.*)

Id. at 33. One commentator, after the Ohio Supreme Court's decision in *Rogers*, noted:

> If past treatment of the issue by the courts and legislative intent were the only considerations to weigh in determining who will bear the burden of persuasion on affirmative defenses in future trials, it is likely that Ohio defendants will continue to shoulder that burden.

Comment, *Affirmative Defenses in Ohio After Mullaney v. Wilber*, 36 Ohio St. L.J. 828, 829-30 (1975).

To be sure, the language quoted from *Rogers* was dicta, and, as a consequence, at the time of petitioner's trial the question of who must bear the burden of proving an affirmative defense had not been definitively answered. But one need not adopt the radical position, attributed to Gray and Salmond, that a statute is not a law until interpreted by the courts, to conclude that the law at the time of petitioner's trial was not what *Robinson* later held it to be. *Compare* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897) *with* H.L.A. Hart, *The*

Thus, the "real issue" presented in the instant petition is not whether the trial judge's instruction to the jury as to who had the burden of proving self-defense was inconsistent with Ohio law. It is instead whether petitioner is entitled to the retroactive application of *State v. Robinson*. The Court concludes he is not.

As a preliminary, the Court notes that the Constitution does not require the retroactive application of a new interpretation of a statute. *See, e.g., Halliday v. United States*, 394 U.S. 831 (1969). *See also* R. Dickerson, *The Interpretation and Application of Statutes* 255-57 (1975). The decision to apply a new rule retroactive, effective immediately, or prospective is essentially one of policy, the wisdom of which this Court is not in a position to judge. Petitioner, therefore, is entitled to the benefits of Section 2901.05 (A) as established in *Robinson* only if 1) he is within that class of persons the Ohio Supreme Court has determined *Robinson* applies to, or 2) (and the point is debatable) he has been excluded from claiming the benefits of *Robinson* by a decision which is arbitrary, capricious, or violative of the equal protection clause.

The Ohio Supreme Court has decided to apply *Robinson* retroactively, but only if the issue properly was preserved at trial and raised on appeal. *State v. Humphries*, 51 Ohio St. 2d 95, 102-03 (1977). As a matter of state law, therefore, petitioner is not entitled to the benefits of the *Robinson* decision.[2] Moreover, this Court can find nothing wrong, as a matter of federal constitutional law, with the Ohio Supreme Court's decision to apply *Robinson* only to those who did not waive the issue. Even assuming this rule can be tested against principles of equal protection or substantive due process, *but see Milwaukee Electric Ry. Co. v. Wisconsin*, 252 U.S. 100 (1920); *Beck v. Washington*, 369 U.S. 541 (1962); *United States ex rel. Almeida v. Rundle*,

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Concept of Law 132-144 (1961). Indeed, the fact that the Ohio Supreme Court had to decide whether to apply *Robinson* retroactively is, the Court believes, strong evidence that the Ohio Supreme Court recognized it had worked a substantial change in the law in *Robinson*.

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[2]Though it is unclear whether petitioner raised the issue at trial, it is clear that he did not raise it on appeal. *See* Rule 12(A), Ohio Rules of Appellate Procedure.

255 F. Supp. 936 (E.D. Pa. 1966), *aff'd*, 383 F. 2d 421 (3rd Cir. 1967), *cert. denied*, 393 U.S. 863 (1968), certainly its application substantially furthers the State's legitimate interest in the finality of its decisions. *See Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977). Indeed, the United States Supreme Court has indicated that a rule such as the one adopted in Ohio is a legitimate method of insulating past convictions against the retroactive application of new constitutional standards. *Hankerson v. North Carolina*, 432 U.S. 233, 244 n. 8 (1977).

For the reasons set out in this Court's prior Order, it was not a denial of due process for the State to place the burden of proving self-defense by a preponderance of the evidence on petitioner. For the reasons set out above, petitioner was not entitled to the benefits of *State v. Robinson*. Accordingly,

IT IS ORDERED that the petitioner's motion for reconsideration is overruled.

Signed By
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.
January 22, 1979.

No. 79-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED DEC. 18, 1980]

HOWARD HUGHES,
Petitioner-Appellant,
vs.
TED ENGLE, SUPT.,
Respondent-Appellee.

ORDER

BEFORE: KENNEDY and MARTIN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Hughes appeals the denial of his petition for writ of habeas corpus after conviction in a state court in Ohio in January 1975 of voluntary manslaughter. The state trial court charged the jury that Hughes must establish his defense of self-defense by a preponderance of the evidence.

In light of the decision of this Court in *Isaac v. Engle*, No. 78-3488, (6th Cir., December 12, 1980) (en banc) (Kennedy, J., dissenting), the judgment of the District Court is reversed and the action remanded to the District Court with directions to grant the writ unless the State of Ohio chooses to retry Hughes within a reasonable time.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

No. 79-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED JAN. 21, 1981

HOWARD HUGHES,
Petitioner-Appellant,

vs.

TED ENGEL, SUPERINTENDENT,
CHILLICOTHE CORRECTIONAL FACILITY,
Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

Signed by
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C77-156A

[FILED JAN. 26, 1979]

HOWARD HUGHES

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

JUDGMENT ENTRY

The Court having denied the petition for habeas corpus relief under 28 U.S.C. Section 2254,

IT IS ORDERED, ADJUDGED, AND DECREED that this action is hereby dismissed.

Signed by
Leroy J. Contie, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C77-156A

[FILED JUN. 26, 1979]

HOWARD HUGHES

Petitioner

vs.

TED ENGLE, Superintendent

Respondent

ORDER

This is an action for habeas corpus relief under 28 U.S.C. Section 2254. Pursuant to this Court's Order, the instant action was referred to the U.S. Magistrate for a report and recommended disposition of the matter. The Magistrate filed his report on August 10, 1977, and recommended that the petition for writ of habeas corpus be denied. Thereafter, petitioner filed objections to said report. Subsequently, the Court granted the parties leave to file additional briefs.

Upon consideration of the Magistrate's Report and Recommendation and independent review of the entire record in this action, the Court concludes that an evidentiary hearing is not required and that the petition shall be denied.

Petitioner was indicted by the Grand Jury of Summit County, Ohio, September 1974 term, for aggravated murder in violation of Ohio Revised Code Section 2903.01 (A). After entering a plea of not guilty, he was found guilty by a jury on September 24, 1975 of the lesser included charge of voluntary manslaughter, Ohio Revised Code Section 2903.03. Petitioner was sentenced to imprisonment for a period of from six to twenty-five years. The conviction was affirmed on appeal and the Supreme Court of Ohio denied review.

Thereafter, petitioner initiated the instant action for habeas corpus relief. As grounds therefor he asserts that the trial court's instruction placing upon him the burden of proving self-defense violated his right to due process of law under the Fourteenth Amendment. Petitioner also claims a denial of due process as a result of allegedly highly prejudicial comments by the prosecution. The Court, having found exhaustion of available state remedies in its Order of June 4, 1979, shall separately address each of petitioner's claims.

With regard to the first ground advanced in support of the petition, the record shows that the trial court charged the jury on aggravated murder, murder, and voluntary manslaughter. He then stated that petitioner "claims that what he did was justified on the basis of self-defense." After defining the elements of self-defense, the trial court proceeded as follows:

> The burden of proving the Defense of Self-defense is upon the Defendant. He must establish such Defense by a preponderance of the evidence.
>
> If the Defendant fails to establish the Defense of Self-defense, the State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges, and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder, or any of the lesser included charges, or if you find the Defendant proved by a preponderance of the evidence the Defense of Self-defense, then you must find the Defendant not guilty.

(Tr. at 342-43). Petitioner claims that this instruction violates due process.

Initially, at the time of petitioner's trial, Ohio law was construed to require a defendant to prove an affirmative defense by a preponderance of the evidence. See *State v. Seliskar*, 35

Ohio St. 2d 95 (1973); *State v. Rogers*, 43 Ohio St. 2d 28 (1975), cert denied, 423 U.S. 1061 (1976). Subsequently, however, section 2901.05 of the Ohio Revised Code, effective January 1, 1974, was interpreted to place upon a defendant only the burden of going forward with evidence sufficient to raise the affirmative defense of self-defense. *State v. Robinson*, 47 Ohio St. 2d 103 (1976). Thereafter, said interpretation was held to apply to all criminal trials conducted after January 1, 1974. *State v. Humphries*, 51 Ohio St. 2d 95 (1977). It is thus apparent that the trial court's instruction herein was erroneous under Ohio law. Nevertheless, in order to prevail in a federal habeas corpus action, this instruction must constitute constitutional error.

Due process requires that the state prove beyond a reasonable doubt that every fact necessary to constitute the crime with which an accused is charged. *In Re Winship*, 397 U.S. 358, 364 (1970). The state cannot consistent with due process shift the burden of proof to the accused by presuming an essential element of the crime upon proof of the other elements. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). It is not required, however, to prove beyond a reasonable doubt the nonexistence of an affirmative defense which the state recognizes as an exculpatory or mitigating circumstance affecting the degree of culpability or punishment. *Patterson v. New York*, 432 U.S. 197, 207-209 (1977). As clearly stated by the Supreme Court:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Id. at 210. Rather, the state can constitutionally burden the accused with proving an affirmative defense which does not negate any facts of the crime that the state must prove in order to convict. *Id.*

Petitioner was convicted of voluntary manslaughter which is defined as "knowingly causing the death of another while under extreme emotional stress, brought on by serious provocation reasonably sufficient to incite the Defendant into using deadly force." (Tr. 337-38). Ohio Rev. Code Section 2903.03. The state was required to prove each of these elements beyond a reasonable doubt. No other elements are either presumed or inferred. In Ohio, the absence of self-defense is not an element of aggravated murder, murder, or voluntary manslaughter. *Cf. Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978). Rather, self-defense will excuse the unlawfulness of an act otherwise criminal. *State v. Gideons*, 52 Ohio App. 2d 70, 74 (1977). It is a justification or exculpatory circumstance whereby punishment for conduct otherwise considered criminal is avoided. The elements or facts constituting self-defense are independent of and do not bear a necessary relationship to the required elements of voluntary manslaughter, murder or aggravated murder. Further, a jury instruction that the state must prove the absense of self-defense or disprove self-defense beyond a reasonable doubt is not mandated. *State v. Abner*, 55 Ohio St. 2d 251 (1978). Thus in Ohio, self-defense is a true affirmative defense which does not negative any facts of the crime charged that the state must prove beyond a reasonable doubt in order to convict. This is and was the law in Ohio at the time of petitioner's trial.

In view of the foregoing, the Court concludes that the trial court's instruction placing the burden of proving self-defense upon petitioner did not violate due process. See *Henderson v. Jago*, Civil Action No. C78-503 (N.D. Ohio May 15, 1979); *Bell v. Perini*, Civil Action No. C78-343 (N.D. Ohio December 26, 1978); *Hooper v. Perini*, Civil Action No. C78-368 (N.D. Ohio December 26, 1978). There was no unconstitutional shifting of the state's burden to petitioner to negate an essential element of voluntary manslaughter, murder, or aggravated murder. On the contrary, due process was satisfied when the state proved beyond a reasonable doubt the facts constituting voluntary manslaughter.

Further and alternatively, the Court concludes that petitioner is not entitled to relief on his first claim for failing to specifically object to the trial court's instruction regarding self-defense. Failure to comply with Ohio's contemporaneous objection rule, Rule 30, Ohio Rules of Criminal Procedure, precludes federal habeas corpus review unless petitioner demonstrates cause for noncompliance and actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Petitioner has offered no explanation or justification for failing to object to the trial court's instruction at the time of trial. Nor has any actual prejudice to the petitioner been shown; the Court has not found any constitutional error or error that infected the fundamental fairness of the trial. *Cf. Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978); *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978); *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978). Thus, the Court is of the opinion that federal habeas corpus review of the petitioner's first claim should be barred. *Wainwright v. Sykes, supra.*

As his second ground for relief, petitioner alleges a denial of due process and fundamental fairness as a result of prejudicial comments by the prosecutor. Specifically, he urges that certain remarks of the prosecutor during cross examination of petitioner and in final argument were extensive, and had a tendency to mislead the jury and to prejudice petitioner. Further, petitioner claims that the trial court's instructions to the jury to disregard such comments were futile.

In order to constitute a constitutional violation, it is necessary that the prosecutor's comments rendered petitioner's trial "so fundamentally unfair as to deny him due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). A determination of fundamental unfairness is to be made after careful review of the totality of the circumstances. *Hayton v. Egeler*, 555 F. 2d 599, 604 (6th Cir. 1977).

Upon review of the transcript of petitioner's trial, the Court cannot find that the prosecutor's conduct rises to the level of a constitutional violation. The trial court sustained objections made by petitioner's counsel to improper remarks of the prosecutor, and admonished the jury to disregard such comments and the inferences contained therein. Additionally, the trial court in its charge instructed and cautioned the jury that:

> The evidence, however, does not include the Indictment, the Opening Statements of Counsel or the Closing Arguments of Counsel. The Opening Statements and Closing Arguments of Counsel are designed to assist you. They are not evidence.
>
> Statements or answers that were stricken by the Court, or which you were instructed to disregard, are not evidence and must be treated as though you had never heard them.
>
> You must not speculate as to why the Court sustained the objection to any question, or what the answer to such question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

(Tr. at 332). Contrary to petitioner's assertions, these specific admonitions and instructions served to mitigate any overall effect of the prosecutor's comments. Therefore, the Court concludes that petitioner was not deprived of a fundamentally fair trial.

Accordingly, the instant petition is hereby denied and this action shall be dismissed.

IT IS SO ORDERED.

Signed by
Leroy J. Contie, Jr.
U.S. District Judge

No. 79-3317

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT CARTER,
Petitioner-Appellant,
vs.
ARNOLD R. JAGO,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

[DECIDED AND FILED DEC. 22, 1980]

Before: Celebreeze, Brown and Kennedy, Circuit Judges.

Celebrezze, Circuit Judge, delivered the opinion of the Court in which Brown, Circuit Judge, concurred. Kennedy, Circuit Judge, (p. 19) delivered a separate opinion concuring in part and dissenting in part.

Celebrezze, Circuit Judge. In 1973, petitioner Robert Carter was convicted of murder in the second degree by a jury in Cuyahoga County, Ohio. The Cuyahoga County Court of Appeals affirmed the conviction. In his appeal to the Ohio Supreme Court, Carter raised several additional allegations of error not presented to the appeals court. The Ohio Supreme Court denied petitioner's motion for leave to appeal for lack of a substantial constitutional question.

In 1977, Carter filed a petition for a writ of habeas corpus with the United States District Court for the Northern District of Ohio. In the return of writ the respondent suggested that Carter had failed to exhaust available state remedies and that a delayed appeal was available under Rule 5 of the Ohio Rules of Appellate Procedure. While the matter was pending in the Federal District Court, a motion for leave to file a delayed appeal was entered by Petitioner, in essence raising the issues previously raised for the first time before the Ohio Supreme Court. This motion was denied by the Cuyahoga County Court of Appeals and on appeal the Ohio Supreme Court dismissed the appeal as of right and also overruled a motion for leave to appeal. District Judge William K. Thomas thereafter denied habeas corpus relief to

Carter and this appeal followed. We now affirm the decision of the District Court.

FACTS

In May of 1973, Mr. John Knific was residing at the Milner Colonial Hotel located on Prospect Avenue in Cleveland. On May 22, 1973, Mr. Knific entered the hotel at approximately 2:15 a.m. in the company of another man. Knific informed the desk clerk, Henry Dora, that the man was his guest and that both were going to Knific's room. Knific, who had lived at the hotel for approximately two years, was at that time living in Room 614. Shortly after Knific and the other man left the lobby for Knific's room, Mr. Stanley Orack, the day clerk was informed by Dora that Knific had taken a guest to his room. Mr. Orack was living directly adjacent to Knific's room.

At approximately 3:00 a.m., Mr. Dora received a call from Knific's room requesting an outside number. The hotel telephone system required that all outgoing calls be placed through the main switchboard. Knific gave Dora the first three digits of the number, 481, at which time Dora heard scuffling and a shot. Dora immediately called Orack's room to inform him of the trouble, and then called the police. Dora testified that Knific sounded calm when he requested the number.

Just before receiving Dora's call, Stanley Orack was watching television in his room. Orack heard scuffling and two or three loud crashes from the direction of Knific's room. After telling Dora to call the police, Orack went to Room 614 and knocked on the door. Mr. Orack stated that when he first approached the room, he could hear dresser drawers opening and closing. After his knock, the room became quiet, and then Carter opened the door. Orack told Carter that he would have to wait until the police arrived, at which time Carter reached into his waistband. Orack knocked Carter to the floor and when Carter started to get up, he had a pistol in his hand. Orack immediately returned to his room where he waited until he heard the police arrive. While he was waiting in his room, Orack heard someone rattling on his door; when he left the room, he noticed blood on his doorknob.

Patrolmen Galka and Couzer received a radio call directing them to the Milner Hotel at approximately 3:10 a.m. As they arrived on the sixth floor and started down the hallway toward Room 614, they were met by Carter who was running in their direction. Carter had blood on his head from the blow he received from Orack. He was apprehended, searched, and found to be carrying a .22 caliber revolver containing three spent shells and one live round. John Knific died on June 27, 1973, as a result of the gunshot wounds he received.

Carter testified at trial and admitted having shot John Knific. His testimony is summarized by the state court of appeals as follows:

> The appellant testified that he and Mr. Knivic went to Mr. Knivic's hotel room to engage in homosexual acts. When both men were undressed, Mr. Knivic allegedly told the appellant that he enjoyed beating people. (R. 232). The appellant further testified that this remark made him afraid for his life. (R. 232). The appellant made an attempt to dress himself, but at that time he was grabbed by Mr. Knivic, and the appellant, who had a gun in the pocket of his jacket, reached for his gun and shot Mr. Knivic. The appellant stated that he didn't intend to shoot the decedent but rather that he was pulling the trigger when he thought the chamber of the gun was empty to frighten him. (R. 238). The decedent received three bullet wounds. The decedent died one month after the shooting, allegedly as the result of the gunshot wounds.

The jury, however, returned a verdict of guilty of murder in the second degree. As a result, the petitioner was sentenced to life imprisonment.

I.

Initially, Carter alleges error by the district court in failing to conduct an evidentiary hearing on the question of exhaustion of state remedies. The basis of this contention is difficult to discern. Admittedly, Carter raised several issues for the first time in his appeal to the Ohio Supreme Court. Since exhaustion was solely an issue of law, the district court had only to determine whether any state remedy was still available. The district court, in ruling on exhaustion noted that the court of appeals had indicated that petitioner could raise the issues presented in the delayed appeal in a post conviction proceeding in the trial court. Thus, there was reason to doubt whether Carter had exhausted all available state remedies.

In the interim of this appeal, this court decided *Collins v. Perini*, 594 F. 2d 592 (6th Cir. 1979), and *Keener v. Ridenour*, 595 F. 2d 581 (6th Cir. 1979), which hold that neither a delayed appeal nor a post conviction appeal would be available to one, such as petitioner, who has already had an appeal. Petitioner's habeas petition is properly before the court for decision then. The district court's decision, however, was not founded only upon the exhaustion issue. The observation that petitioner might have further state remedies available was an afterthought to a conclusion that Carter had waived several claims he sought to present in his petition. We now turn to those claims.

II.

In his instruction to the jury the trial judge charged the jury that the burden of proof was on the defendant to prove the affirmative defense of self-defense by a preponderance of the evidence. At the time of trial, state law clearly mandated the instruction issued by the trial judge. *State v. Seliskar*, 35 Ohio St. 2d 95 (1973).[1] The critical portions of the charge are as follows:

> The law says this defendant cannot be convicted of any offense in the charge of this indictment notwithstanding the fact that he may have killed John Knivic if, at the time of committing such offense he was acting in self-defense.

[1] *Seliskar* was grounded upon the well-established common law rule that allocated to the defendant the burden of proving affirmative defenses by a preponderance of the evidence. Ohio Rev. Stat. 2901.05(A), effective January 1, 1974, contained no language relative to the burden of proof for affirmative defenses. The Ohio Supreme Court construed 2901.05(A) in *State v. Robinson*, 47 Ohio St. 2d 103 (1976), and held that in a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence sufficient to raise that defense. *Robinson* received retroactive effect in *State v. Humphries*, 51 Ohio St. 2d 95 (1977). The 1978 Amendment to 2901.05(A) effectively changed the rule of *Robinson* so as to reinstate the common law rule requiring a defendant to prove an affirmative defense by a preponderance of the evidence. This requirement has been held to be constitutional in *State v. Newell*, Ohio App. 2d (#40470 Dec. 28, 1979) (8th App. Dist.).

Self-defense in a proper case is the right of every person. The essential elements of self-defense are these:

First, the defendant must be free from fault, that is, he must not have provoked the defendant or purposely brought on the combat.

Second, there must be present a pending peril to life or great bodily harm, either real or apparent as to create the bona fide belief of an existing assassin.

Now, a man may repel force by force even to the extent of taking a life in the defense of his person. A bare fear, however, of being killed or receiving bodily harm is not sufficient to justify one inflicting serious injury or death upon another. It must appear that the circumstances were sufficient to excite the fear of a reasonable person similarly situated as the defendant and the defendant acted in good faith and in viewing the situation and circumstances from his standpoint, really acted under the influence of such fear and not in the spirit of malice or revenge.

Now, that is this: the jury is to look at the situation from the standpoint of the defendant himself at the time he acted as charged in the indictment and determine under the circumstance of stress and excitement surrounding him whether, without fault or carelessness on his part he did honestly believe he was in imminent danger of losing his life or receiving great bodily harm, and to prevent this it was necessary for him to act as he did act.

When a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it says it may be in his power to do so without increasing his danger, may kill his assailant to save his own life or protect himself from great bodily harm.

The law of self-defense is the law of necessity, pure and simple. It is not an offensive law, but it is a defensive law and the burden of proving it rests upon the defendant, so he is not called upon to establish the defense beyond a reasonable doubt.

It is sufficient if he establishes it by a preponderance of the evidence. Now, by preponderance of the evidence is meant the greater weight of the evidence, that evidence in the case which is more convincing of its truth and which influences the minds of the jury; the minds of the jury in the conclusion you reach, the evidence in the case which you find be entitled to the greater weight.

> Now, if you find by a preponderance of the evidence that the defendant, Robert Carter, in careful and proper use of his faculties and without wrong on his part, in good faith believed and had reasonable grounds to believe that at the time of the shooting he was in imminent danger of death or of great bodily harm at the hands of the deceased, John Knivic, and that his only means of escape from the danger was taking the life of the deceased, he would be justified in so doing even though in fact the defendant may have been mistaken as to the imminence of the danger.

Although no objection was raised to this charge at trial or registered in the court of appeals, Carter raised this instruction as an assignment of error in his memorandum in support of jurisdiction in the Ohio Supreme Court, which dismissed the appeal for want of substantial constitutional question. He now reiterates this claim in his habeas petition.

Petitioner argues that the imposition of the burden of proof on him regarding the issue of self-defense violated due process. Primary reliance is placed upon *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which makes clear that the state has the burden of proving every element of the crime beyond a reasonable doubt. In that case the state of Maine required a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce a homicide charge to manslaughter. The Supreme Court concluded that since the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358 (1969), it must also prove the absence of heat of passion, which is malice beyond a reasonable doubt.[2]

In general terms, Mullaney held that the Fourteenth Amendment's guarantees prohibit a State from shifting to the defendant

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[2]In a footnote the Court indicated that states may place a burden of *production* on the defendant without offending the intent of *Mullaney*. States can require the defendant to produce "some evidence" demonstrating action in the heat of passion before requiring the prosecution to negate this element. 421 U.S. at 701 n. 28. Thus, while *Mullaney* proscribed the use of presumptions which shift the evidentiary burden onto the defendant for establishing certain facts, the decision did not circumscribe all procedural presumptions which require a defendant to introduce evidence contesting the otherwise presumed or inferred facts.

the burden of disproving an element of the crime charged when the state has presumed its existence. In *Hankerson v. North Carolina*, 432 U.S. 233 (1977), a unanimous Supreme Court gave retroactive effect to *Mullaney* because the major purpose of the doctrine illuminated in *Mullaney* was to enhance the truth-finding function of a criminal trial so as to erase the serious questions about the accuracy of guilty verdicts in past trials.

The state first argues that, even though Carter had the burden of proof in proving self-defense, federal habeas corpus review is precluded by his failure to object at trial to the jury instructions. *Hankerson v. North Carolina*, 432 U.S. 233, 245 n. 8 is cited for the proposition that failure to comply with state procedural objection requirements, as regards objecting to jury instructions, bars collateral attack. This procedural default argument centers around language in *Hankerson* suggesting that a state could minimize the impact of retroactively applying *Mullaney* by enforcing its "normal and valid" procedural rule "that failure to object to a jury instruction is a waiver of any claim of error." The notation consequently raises the contemporaneous objection rule discussed in *Wainwright v. Sykes*, 433 U.S. 72 (1977).[3]

Since petitioner failed to object at trial to the jury instructions, his threshold task is to satisfy the "cause" and "prejudice" standards of *Wainwright v. Sykes, supra*. Carter submits that the intervening *Mullaney* decision is adequate cause for his failure to object. This argument assumes that *Mullaney* would invalidate the jury instructions on self-defense and that because this development could not anticipated,[4] the failure to object should

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[3]Ohio Rule of Criminal Procedure 30 requires as a prerequisite to raising an allegation of error regarding a jury instruction that the party object at trial, stating specifically the grounds for his objection. Failure to raise an objection is tantamount to a procedural default and is not reviewable on appeal absent plain error or a defect affecting substantial rights. O.R.C.P. Sec. 52a; *State v. Long*, 53 Ohio St. 2d 91 (1978); *State v. Lockett*, 49 Ohio St. 2d 48 (1976), overruled in part on other grounds in *State v. Downs*, 51 Ohio St. 2d 47, vacated, 438 U.S. 909 (1978). *Hockenbury v. Sowders*, 620 F. 2d 111 (6th Cir. 1980), makes clear that the standard of review established by *Wainwright* controls petitioner's claims.

[4]The common law had historically regarded self-defense as an affirmative defense to be proved by the accused.

be excused. At the very least, *Mullaney* raised a substantial spectre of doubt as to the constitutionality of Ohio's placement of the burden of proof regarding self-defense. And, it was not the responsibility of trial counsel to fathom or predict the change in due process doctrine that *Mullaney* would occasion. *Isaac v. Engle,* F.2d (6th Cir. 1980) (en banc) holds that in such a situation the absence of any plausible reason for raising an objection will provide the necessary "cause," and "prejudice" will be presumed if the burden of proof is shifted to the defendant when he has produced sufficient evidence to raise the defense of self-defense. Accordingly, petitioner's claim is cognizable in this habeas corpus proceeding.

The gravamen of petitioner's claim is that the Ohio law allocating to the defendant the burden of proving self-defense by a preponderance of the evidence violates principles of due process explicated in *Mullaney. Mullaney* prohibits the State from *presuming* that an element of the crime exists and then placing the burden of proving otherwise on the accused. *Patterson v. New York,* 432 U.S. 197 (1977), reinforces this principle that so long as the legislature does not transgress constitutional limits by defining the elements of a crime so as to create a presumption of the existence of a fact or facts essential to guilt, due process has not been violated. *Patterson* makes clear that the applicability of the reasonable doubt standard is dependent upon how the State defines the offense that is charged in any given case; unless expressly defined by statute, material elements do not include the nonexistence of a fact which, if proven, would constitute a statutory defense. Yet once the elements of a crime are defined by the legislature, each element must be proven beyond a reasonable doubt by the State.

Petitioner was charged with murder in the first degree and murder in the second degree. O.R.C. 2901.01, in effect at the time of trial, contained the following definition:

> 2901.01 Murder in the first degree. (GC 12400, 12399)
>
> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

> Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment will be imprisonment for life.
>
> Murder in the first degree is a capital crime under Sections 9 and 10 of Article, Ohio Constitution.

Court interpretation of the statute has isolated three "elements" of murder in the first degree: 1) an actual killing; 2) intent, *State v. Farmer*, 156 Ohio St. 214, 102 N.E. 2d 11 (1952); *Palfry v. Cardwell*, 448 F. 2d 328 (6th Cir. 1971); and 3) deliberate and premeditated malice, *State v. Butler*, 11 Ohio St. 2d 23, 227 N.E. 2d 627 (1967).

The jury instructions issued by the trial judge were in accord with these requirements:

> Murder in the first degree is the killing of another purposely and with deliberate and premeditated malice.
>
> Let me say to you that the defendant in this case entered a plea of not guilty and by so doing he puts in issue each and every one of the essential elements of the crime of murder in the first degree before you can find the defendant guilty, you must find beyond a reasonable doubt, one, that John Knivic was a living person and he was killed by the defendant in Cuyahoga County on or about the 27th day of June, 1973. Two, that the killing was done purposely. Three, that the killing was done with deliberate and premeditated malice.

Carter was also charged with, and eventually convicted of, murder in the second degree.

Murder in the second degree was defined by statute as follows:

> 2901.05 Murder in second degree (CC 12403)
>
> No person shall purposely, and maliciously kill another. Whoever violates this section, except in the manner described in 2901.01, 2901.02, 2901.03, and 2901.04 of the Revised Code, is guilty of murder in the second degree and shall be imprisoned for life.

The case law surrounding the statute identified an actual killing, intent and purpose to kill, and simple malice as elements of the crime. *State v. Butler, supra; In re Williams*, 41 Ohio App. 2d 144, 324 N.E. 2d 182 (1974).

The jury instructions also paralleled these requirements:

> Murder in the second degree is the killing of another purposely and maliciously and before you can find the defendant guilty of murder in the second degree you must find beyond a reasonable doubt, one, that John Knivic was a living person and he was killed by the defendant in Cuyahoga County on or about the 27th day of June, 1973.
>
> Two, that the killing was done purposely and maliciously.

The thrust of an inquiry under *Mullaney* and *Patterson* is whether the State has defined the elements of the crime so as to presume a fact essential to guilt and then compelled the accused to negate that element of the crime. Under this analytical framework, Ohio's law passes constitutional muster. The three elements of murder—homicide, intent and malice are not presumed; each element must be proven beyond a reasonable doubt. The jury instructions on intent and malice reflect the lack of any presumption. Rather, intent and malice may be *inferred* by the jury from the given facts and circumstances.[5] While presumptions of an element are clearly unconstitutional, permissive inferences do not fun afoul of the Constitution. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

---

[5]Now, purpose is a decision of the mind of knowingly doing an act with a design to accomplish a specific result.

To do an act purposely is to do it intentionally. The purpose or design with which a person does an act is usually known only to himself unless he expresses it to others or indicates it by his conduct.

A person is presumed to have a purpose or a design behind his voluntary acts unless his actions are otherwise explained by the evidence.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the intent or purpose to kill may be inferred from the use of the weapon.

An essential element of this crime is that the act be done maliciously or with malice. Malice is a state of the mind which characterizes the doing of a wrongful, unlawful act intentionally without legal justification or excuse.

Ill-will or hostility against the person of another are not required. The word malice has a special meaning when used in law. For the purpose of these instructions, malice is the state of mind or purpose which characterizes the doing of a wrongful, unlawful act intentionally without legal justification or excuse.

Since Ohio law does not presume that any element of the crime of murder exists, *Mullaney* is not offended. *Mullaney* was grounded upon the principle established by *In re Winship:* that the state must prove each element of the crime beyond a reasonable doubt. The practice struck down in *Mullaney* offended *Winship's* notion of due process because Maine law presumed the existence of malice and placed the burden of disproving that element upon the accused. Ohio's procedure, on the other hand, did not presume malice's presence but required the State to establish it beyond a reasonable doubt.

Legal malice may include anger, ill-will or hostility against another. However, they are not required. In its legal sense, malice means the doing of a wrongful, unlawful act intentionally regardless of social duty.

The existence of malice is determined from the manner in which the act is done, the means, weapons used and from all of the other facts and circumstances in the evidence.

Where one intentionally shoots another with a weapon in a manner calculated to cause death, you may infer that the act was done maliciously.

To constitute malice in the first degree, malice must be both deliberate and premeditated.

Deliberation means the act was not the result of a sudden impulse, that some thought and consideration was given by the defendant before arriving at the purpose or intent to kill.

Premeditation means that this thought process was used and that the purpose to kill was turned over in the defendant's mind and the decision to kill made prior to the commission of the act.

There is no definite period of time that must elapse for the formation of the purpose to kill. The test is not the duration of time but the existence of the reflection. The law requires that the mind be sufficiently composed to reflect upon the killing and understand the nature and character of the act and its consequence.

If you find that the defendant actually formed the purpose to maliciously kill and deliberated and premeditated upon it before he performed the act, that is sufficient for this element of the crime.

If you find the State has proved beyond a reasonable doubt all of the essential elements of the crime of first degree murder, then your verdict must be guilty. However, if you find the State has failed to prove any one or more of the essential elements of the crime of first degree murder, then you must find the defendant not guilty of first degree murder. . . .

The jury was instructed in accordance with the statute and the guilty verdict confirms that the State successfully carried its burden of proving the elements of the crime beyond a reasonable doubt. The evidence, including that offered with respect to Carter's defense of self-defense, was insufficient to raise a reasonable doubt about his guilt as a murderer.[6] The State had satisfied the command on *In re Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which (Carter was) charged." 397 U.S. at 364. And as the Supreme Court noted in *Patterson*, 432 U.S. at 206:

> In convicting Patterson under its murder statute, New York did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

The above analysis applies with equal force to the instant case. Accordingly, under the Ohio statutes in effect at the time of petitioner's trial, it was not a due process violation for Ohio to compel a defender to shoulder the burden of proving the affirmative defense of self-defense by a preponderance of the evidence.

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[6]Proof of self-defense constitutes an absolute defense in that it renders the homicide justifiable or lawful. A finding of self-defense negates the element of unlawfulness and if the relevant statute commands a state to prove unlawfulness, then the state must prove the absence of self-defense.

Where state law includes unlawfulness or the absence of self-defense as an element of murder, the courts have held instructions putting the burden of proving self-defense upon the defendant to be constitutionally infirm under *Mullaney*. Wynn v. Mahoney, 600 F. 2d 448 (4th Cir. 1979) *cert. denied*, 444 U.S. 950 (1980); *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir.) *cert. denied*, 439 U.S. 955 (1978); *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979); *Cole v. Stevenson*, 477 F. Supp. 1268 (E.D.N.C. 1978) *rev'd on other grounds*, 620 F. 2d 1055 (4th Cir. 1980) (*en banc*); *Porter v. Leeke*, 457 F. Supp. 253 (D.S.C. 1978).

At first glance, it might appear that the Ohio courts consider unlawfulness to be an element of the crime of murder. In *State v. Simon*, (No. 6262 Jan. 16, 1980) the Court of Appeals of Montgomery County, Ohio considered a due process challenge to O.R.C. 2901.05(A) and concluded that because an indictment for a

III.

Petitioner also argues that his constitutional rights were violated by the admission of the testimony of Howard Sadler. Specifically, Carter submits that the testimony of Sadler 1) was unrelated to the shooting of Knific; 2) was prejudicial insofar as Sadler testified from a wheelcair; 3) was used by the prosecution solely to inflame the passions and prejudices of the jury; and 4) the jury was improperly charged about the purpose of Sadler's testimony.[7]

Petitioner attempts to raise these claims to a constitutional dimension by alleging that these errors were so prejudicial that he was denied his due process right to a fair trail. Our inquiry in reviewing this claim is directed to whether the evidence was rationally connected to the crime charged. *Manning v. Rose*, 507 F. 2d 889 (6th Cir. 1974). That connection is established here by the similarity of the crimes. Petitioner's defense was self-defense in both cases. In both cases, Carter had a deadly weapon on his person; in both, he had been drinking prior to the shooting; and in both, the victim was a homosexual with whom Carter had had a relationship.

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criminal offense must charge the general allegation of unlawfulness, the allegation of unlawfulness must be proved by the state. Since self-defense negates unlawfulness, the court held that the state cannot shift the burden of proving self-defense to the defendant. On January 22, 1980, the court issued a supplemental opinion retracting its decision with regard to the constitutionality of 2901.05(A) on the grounds that the question had not been at issue in the appeal.

In *State v. Tuncle*, (No. 38424, March 8, 1979), the Court of Appeals of Cuyahoga County gave full consideration to the due process problems associated with placing the burden of proof of self-defense on the accused. Although the constitutionality of 2901.05(A) was not before the court, the lead judge concluded that unlawfulness is a fact to be proved by the state in a prosecution for voluntary manslaughter. Thus the burden of proving self-defense could not be placed on the defendant. To reach this result the writing judge relied on the Ohio Constitution which requires that every indictment (but not statute) allege that the offense is "against the peace and dignity of the State of Ohio," finding this language to be the functional equivalent of "unlawfulness." While this result is supported by the fact that Ohio defines voluntary manslaughter as an "unlawful killing", the vitality of *Tuncle* is sapped by the express disagreement of the second judge on the panel and by the third judge who concurred only in the result.

Carter also contends that he was denied a fair trial by virtue of prosecutorial misconduct in the presentation of Sadler's testimony. The District Court rejected this claim:

> Petitioner next argues that he was denied his right to a fair trial because Sadler testified from a wheelchair, and was questioned about the extent of his injuries. The trial judge's remarks at the time Sadler was called to testify indicate that Sadler was "physically unable to take the witness chair," (Tr. 148) and therefore was permitted to testify from his wheelchair. This is not an instance, therefore, of a gratuitous attempt to inflame the passions of the jury. Certainly the fact that Sadler was in a wheelchair would have an impact on the judge's weighing of the probative value and prejudicial effect of Sadler's testimony. But this court cannot say that the decision to permit Sadler to testify from a wheelchair deprived petitioner of his right to a fair trial.
>
> As far as the prosecutor's question about the extent of Sadler's injury is concerned, this court agrees with the court of appeals that the question, though perhaps irrelevant, was not prejudicial error; and in any event did not deprive petitioner of his due process right to a fair trial. The question was a single question at the end of Sadler's testimony, and basically confirmed what must have already been obvious to the jury—that Sadler was unable to walk. Moreover, the jury was adequately

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Moreover, *Tuncle* is superseded by *State v. Newell* (No. 40470, December 28, 1979) in which the same court upheld the constitutionality of 2901.05(A) in rejecting the due process challenges discussed *supra*. *See also State v. Mascatello*, (No. 40484) (8th App. Dist. March 13, 1980). Also significant is *State v. Abner*, 55 Ohio St. 2d 251 (1978), in which the Ohio Supreme Court held a trial judge did not err in refusing to give an instruction that the prosecution must disprove the affirmative defense of self-defense beyond a reasonable doubt. Thus, the current controlling Ohio law indicates that it is not a due process violation to force a defendant to prove self-defense by a preponderance of the evidence. These recent decisions are relevant in light of the fact that the 1978 statute which they interpret imposes the same burden of proof on a defendant as was imposed on petitioner in his 1973 trial.

Allowing a State to treat self-defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality. While forcing the state to disprove self-defense may be wise as a matter of policy, *Patterson* does not authorize judicial modification of a legislature's evidentiary standard in the absence of constitutional infirmities.

instructed on the limited purpose of Sadler's testimony. (Tr. 327). Taken in context, this question and answer provides no basis for federal habeas relief.

Finally, petitioner contends that the prosecutor's closing remarks about Sadler's testimony were so prejudicial as to deny him a fair trial. As the court of appeals held, these remarks were not relevant and were inappropriate.[4] (Footnote omitted). Nonetheless, *Donnelly v. Christofaro*, 416 U.S. 637 (1974), teaches that not every improper remark by a prosecutor is grounds for federal habeas relief. The remark must be viewed in context; in this case it was an isolated argument at the end of an otherwise unobjectionable closing argument. The jury was instructed that the remarks of counsel were not evidence (Tr. 275, 276, 324), and was further instructed about the limited purpose of Sadler's testimony (Tr. 327). Under these circumstances, the prosecutor's remark cannot be said to have "made respondent's trial so fundamentally unfair as to deny him due process." *Donnelly v. DeChristofaro, supra*, at 645.

Finally, Carter claims that evidence was insufficient to support his conviction. This claim is wholly devoid of evidentiary support as recognized by the District Court:

The record in this case clearly supports the court of appeals' determination that there was sufficient evidence to sustain a conviction of second degree murder. Among other facts supporting the finding of malice and intent to kill are the following: (1) decedent was shot three times, twice in the head and once in the abdomen; (2) just prior to the shooting, decedent called the hotel desk and seemed calm, negating the suggestion that the shooting was provoked; (3) after the shooting, Mr. Orack heard dresser drawers opening and closing, suggesting that robbery was the impetus for the shooting; (4) petitioner's explanation for the shooting, as was demonstrated in the prosecutor's closing remarks, was so inconsistent and implausible that it can hardly be said to have been beyond the province of the jury to reject it.

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[4] Insofar as petitioner's counsel attempts to relitigate these claims as a matter of state law, he evinces a fundamental misunderstanding of the nature and purpose of habeas corpus review. This court does not sit to exercise direct review over state court decisions. Rather, the scope of habeas corpus review is confined to errors of constitutional dimension. *Bell v. Am*, 536 F. 2d 123, 125 (6th Cir. 1976)

Applying the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), a review of the record in this case in the light most favorable to the prosecution shows that a rational factfinder could have found petitioner guilty beyond a reasonable doubt of murder in the second degree under Ohio law.

For the reasons stated above, the decision of the District Court denying a writ of habeas corpus is affirmed.

Kennedy, Circuit Judge, concurring in part and dissenting in part.

I concur in Judge Celebrezze's opinion with the exception of his analysis of *Wainwright v. Sykes*. I would affirm the judgment of the District Court on this ground as well for the reasons stated in my dissent in *Isaac v. Engle*, No. 78-3488, (6th Cir., 1980) (*en banc*) (Kennedy, J., dissenting).

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CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

JAMES R. KINGSLEY
Counsel of Record
for Isaac

157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

JAY McKIRAHAN
Suite 330
22 E. Gay Street
Columbus, Ohio 43215
(614) 464-3202

ATTORNEYS FOR RESPONDENT ISAAC
(continued on inside front cover)

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 23, 1981
CERTIORARI GRANTED APRIL 20, 1981

RICHARD L. AYNES
Counsel of Record
for Bell and Hughes

J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7331
(216) 375-7751

ATTORNEYS FOR RESPONDENTS BELL AND HUGHES

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Petition for Writ of Habeas Corpus—filed March 31, 1978 (omitted from appendix).
Opinion—filed June 26, 1978 (A38), denying petition.
Opinion—filed February 8, 1980 (A24), by panel reversing the district court.
Order—filed March 24, 1980 (A36), granting rehearing en banc.
Opinion—filed December 12, 1980 (A1), by en banc court reversing the district court.
Order—filed December 16, 1980 (A23), clarifying en banc decision.
Order—filed December 31, 1980 (A37), staying the mandate.

RELEVANT DOCKET ENTRIES—BELL

Petition for Writ of Habeas Corpus—filed August 1, 1978 (omitted from appendix).
Opinion—filed December 26, 1978 (A49), denying petition.
Opinion—filed January 23, 1979 (A56), denying reconsideration.
Opinion—filed December 12, 1980 (A42), reversing district court. 535 F. 2d 575.
Order—filed December 31, 1980 (A48) staying the mandate.

RELEVANT DOCKET ENTRIES—HUGHES

Petition for Writ of Habeas Corpus—filed April 26, 1977 (omitted from appendix).
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State v. Isaac CCP Pickaway Cty. #75-CR-83

NO. 75-CR-83
[FILED MAY 30, 1975]

*Clerk Stamp Deleted

Indictment for Felonious Assault, Crim.R. 7, ORC 2945.75, 2941.17, 2941.25, 2941.060

The State of Ohio, Pickaway County, ss: Court of Common Pleas of the April Term, second session of the grand jury in the year of our Lord One Thousand Nine Hundred and Seventy-Five.

The jurors and the grand jury of the State of Ohio, within and for the body of Pickaway County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Lincoln Isaac on the 29th day of April, 1975, at the County of Pickaway, or by some manner enumerated in section 2901.12 of The Ohio Revised Code whereby proper venue is placed in the County aforementioned, did unlawfully, did, knowingly, cause serious physical harm to Bernard Engle.

Contrary to and in violation of section 2903.11 of the Ohio Revised Code and being a felony of the second degree and being against the peace and dignity of The State of Ohio.

I do hereby certify that this is a true and correct copy of the pleading on file in this office.
*Signature deleted
Clerk of Courts, Pickaway County

*Signature deleted
Prosecuting Attorney for Pickaway County
Prosecuting Attorney for Pickaway County, by

Assistant Prosecuting Attorney

ENDORSED: A TRUE BILL

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position of this defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surround him at that time. You must consider the conduct of the defendant and determine if his acts and words—the conduct of Bernard Engle, and determine if his acts or words caused the defendant to reasonably and honestly believe that he was about to be killed or to receive great bodily harm. The law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances and if the force used is so grossly disproportionate to his apparent danger as to show revenge or an evil purpose to injure his assailant, then the defense of self defense is not available.

The burden of proving the defense of self defense is upon the defendant. He must establish such defense by a preponderance of the evidence. Now a preponderance of the evidence is the greater weight of the evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence that is opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity, that is, the greater

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number of witnesses. In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue, regardless of who produced it. If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the defendant has not established such issue of self defense.

Now, further defining the matter of self defense, Ladies and Gentlemen of the Jury, the defendant must establish that the other party was the aggressor and that the defendant did not himself provoke and cause the injury. The plea of self defense is not available to the person who starts a fight unless, in good faith, he withdraws from the contest and informs the other party of his withdrawal, or by words or acts reasonably indicates that he has withdrawn and is no longer participating in the fight. A defendant is not in a position to claim self defense, if he sought trouble and he provoked a fight and did

not attempt to avoid it or to leave the scene of the trouble. If, in the careful and proper use of his faculties, the defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the defendant, then the defendant having notice of his adversary's position

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was released from the danger, and the right to use force in self defense ended. If thereafter the defendant continued to fight, he becomes the aggressor and a subsequent injury to another is unlawful. Therefore, Ladies and Gentlemen of the Jury, you will then consider the matter of self defense which I gave to you, and the burden of proof of self defense is upon the defendant by a preponderance of the evidence.

Now, I will attempt, Ladies and Gentlemen of the Jury, to summarize for you the matters relative to the defense of the lesser included offense and self defense. If the State has proven to you beyond a reasonable doubt all of the essential elements of the crime of felonious assault, if the defendant has failed to prove by a preponderance of the evidence the defense of self defense, then your verdict would be one finding the defendant guilty of the offense charged, felonious assault. However, if you find the State has failed to prove any one of the essential elements of the crime of felonious assault, you would find the defendant not guilty of that crime. You would then proceed with your deliberations to determine whether the State has proven beyond a reasonable doubt all of the essential elements of the lesser included offense of aggravated assault. If you find that the State has proven beyond a reasonable doubt all of the essential elements

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of the lesser included offense of aggravated assault, then your verdict would be one finding the defendant not guilty of felonious assault, but guilty of the lesser included offense of aggravated assault. On the other hand, if you find the State has not proven beyond a reasonable doubt each and every one of the essential elements of aggravated assault, you would then consider whether the State has proven beyond a reasonable doubt all of the essential elements of the lesser included offense of assault. If you find the State has proven all of the essential elements of the lesser included offense of assault, you would then according to your previous finding, if that is your finding, find the defendant not guilty of felonious assault, not guilty of the offense of aggravated assault, but guilty of the lesser included offense of assault.

Now, if you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of the lesser included offense, or if you find that the defendant proved by a preponderance of the evidence, the defense of self defense, then in that case your verdict would be one finding the defendant not guilty.

Now, Ladies and Gentlemen of the Jury, you will have with you in the jury room four forms of verdicts. You will use the verdict form that concurs to your finding.

State v. Isaac CA Pickaway #CA 346
No. 346

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY, OHIO

[FILED FEB. 11, 1977]
***Clerk Stamp Deleted**

STATE OF OHIO,
Plaintiff-Appellee
vs.
LINCOLN ISAAC,
Defendant-Appellant

Case #CA-346

OPINION

DATED: February 8, 1977

APPEARANCES

Richard L. Gerhardt, Prosecuting Attorney, Circleville, Ohio, for Appellee.

James R. Kingsley, Circleville, Ohio, for Appellant.

ABELE, J.:

Defendant-Appellant takes this appeal from a jury verdict—finding him in violation of Section 2903.12 R.C.—Aggravated Assault, a felony of the fourth degree. Defendant-Appellant was originally charged by the Grand Jury on Indictment for Felonious Assault, Section 2903.11 R.C. but, the trial jury determined that the lesser included offense was mandated by the facts before them.

The State of Ohio entered into evidence three photographs. One Photo, Exhibit 2, portrays the victim soon after the assault; it is a 8"x10" format, displaying the front facial features, illustrating the victim's injuries. This photo is in black and white. In conjunction with this photo, a doctor testified: describing the extent and type of injuries and to some extent the colors not portrayed by the photo.

A second photo, Exhibit 1, was admitted on motion of the State, over defendant's objection, portraying the victim some time after the assault, while in the hospital and recovering from his injuries. This exhibit, illustrates a front facial view, in color, of the victim. There appears also, a corrective medical appliance attached to and partially surrounding the victims face. Along

with the introduction of this exhibit, the victim testified as to his post- assault medical treatment, and prognosis.

A third photo, State's exhibit 3, in black and white, portrays the crime scene; specifically a street scene with chalked in area, described by an officer as a pool of blood.

Defendant-appellant took exception to the introduction of the photographs.

At the close of the evidence, in the Court's charge to the jury concerning the degree of harm one must apprehend to claim self-defense, the Court related that:

> (t-226) "Now, if the defendant had reasonable grounds and and honest belief that he was in imminent danger of death or great bodily harm and that the only means of escape from such danger by injuring his assailant***."

The Court continued:

> (t-227) "The burden of proving the defense of self-defense is upon the defendant. He must establish such defense by a preponderance of the evidence."

From the jury verdict, Defendant-Appellant takes his appeal to this Court and assigns five errors in the Court below: the first of which is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF THE COMPLAINANT.

Defendant-Appellant argues that the photos were inflamatory and prejudicial to his cause; that they were neither relevant, material, nor admissable; that the state did not require this evidence to prove serious physical harm.

We cannot agree with the Defendant-Appellant's arguments.

Serious Physical Harm Section 2901.01(E) requires:

> "1. *
> 2. *
> 3. Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary substantial incapacity.
> 4. Any physical harm which involves some permanent serious disfigurement, which involves some temporary serious disfigurement.

> 5. Any physical harm which involves acute pain of such duration as to result in substantial suffering or which involves any degree of prolonged intractable pain."

This is not a case of prosecutorial "overkill" as the Defendant suggest.

The photo's State's Exhibits 1. 2, 3, are probative of the issue raised by the indictment. As noted by the Plaintiff-Appellee, the admission of such evidence is within the discretion of the court. *State v Cron*, 140 App. 2d 76 43 O. Ops. 2d 201, *State v Fugate*, 36 O. App 2d 131, 65 O. Ops. 2d 1551, *State v. Hill*, 12 O.S. 2d 88, 41 O. Ops. 2d 369.

The Ohio Supreme Court has noted in *State v. Woodards*, 6 O.S. 2d 14, 35 O. Ops. 2d 8, p. 14.

> The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. Although a photograph may be rendered, inadmissible by its inflammatory nature the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissable if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury.

In consideration of the State's burden under Section 2901.01 (E) RC the photographs in question were pertinent to the Jury's apprehension of the facts before it and material to the issues to be examined. The out-of-state authority cited by Appellant is not relevant to the Ohio law on this point. The first Assignment of Error is not well taken and overruled.

The second Assignment of Error is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING TESTIMONY AS TO THE EXTENT OF THE COMPLAINANT'S INJURIES FAR BEYOND THAT REQUIRED BY THE STATUTORY DEFINITION OF SERIOUS PHYSICAL HARM.

Defendant-Appellant cites the stipulation of facts negotiated before trial as sufficient to establish "Serious Physical Harm" Section 2901.01 (E) RC.

Defendant argues further that, the testimony of the victim, as to prognosis and treatment, as well as the doctor's testimony

as to treatment, and the police officer's testimony, acted cumulatively to lead the court to impose a higher penalty and to cause the jury to ignore the Defendant's plea of self-defense.

Upon review of the entire record, the stipulation and the supportive testimony; the Defendant's argument to limit the State in its presentation of proof cannot be sustained.

The Defendant-Appellant concedes "Serious Physical Harm", but the jury returned a verdict to a lesser included offense, that of Aggravated Assault.

We cannot agree that the State was precluded from introducing further supportive evidence of "serious physical harm". There is no indication in the record that the State was so limited under the terms of the stipulation of facts agreed upon.

The testimony received was highly relevant material and probative of the issues at hand. The Second Assignment of Error is overruled.

The Third Assignment of Error is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING DEFENDANT'S INSTRUCTIONS ON SELF-DEFENSE AND FURTHER IN CHARGING THE JURY AS IT DID ON THE AMOUNT OF HARM THE DEFENDANT MUST APPREHEND TO BE ABLE TO AVAIL HIMSELF OF SELF-DEFENSE.

Defendant-Appellant argues and presents cases from Idaho, Iowa, New York, and Texas that provide the requisite amount of apprehension of fear of "bodily harm" to justify action in self-defense. The Trial Court's charge as noted above required the apprehension of "great bodily harm" and came directly from the recommended charges in Ohio Jury Instructions Section 411.311,. 33,.35. Further;

> "A person who is assaulted, if he believes or has good reason to believe that he is in danger of *great bodily harm*, may use sufficient force to repel his assailant and save himself harmless, but no more." (Emphasis added)

See, *State v. Hilbrant*, 7 O. Law Review 440, 54 Wkly, Law Bull. 513, Add'd 83 O.S. 491, 94 NE 1108, *State v. Wilson*, 127 NE 2d 426, 70 O.L.A. 147, *State v. Valter*, Dayton 390, *State v. McLeod*, 82 O. App. 155, 80 N.E. 2d 699.

Unlike the law of the states relied upon by Defendant-

Appellant, Ohio has promulgated and required an apprehension of "great bodily harm" to justify reasonable action in self-defense. Defendant's requested special charge was incorrect and the use of the standard jury instruction by the trial court is sustained. The third Assignment of Error is overruled.

The Fourth Assignment of Error is:

> THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT THE DEFENDANT HAD A DUTY TO RETREAT BEFORE AVAILING HIMSELF OF SELF-DEFENSE.

Once again the Trial Court took its charge to the jury from Section 411.31 *Ohio Jury Instructions*. The Defendant-Appellant argues that the court's charge was incorrect. Examination of the charge on this point reveals two occasions on which the Court discussed retreat and neither of these remotely address the proposition to which the Defendant-Appellant refers.

As noted by the reference cited in Plaintiff-Appellee's Brief (t-225-226):

> "Now, if a person is assaulted by another, who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat but may repel force with force, and inflict the harm, if it reasonably appears to the defendant to be necessary to do so."

The Defendant-Appellant's Fourth Assignment of Error is not well taken and overruled.

The Fifth Assignment of Error is:

> THE COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THE DEFENDANT HAD TO PROVE THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

In support of his argument Defendant-Appellant cites *State v. Robinson*, 47 O.S. 2d 103, 1 O. Ops. 3rd 61, 351 N.E. 2d 88, a recently decided Ohio Supreme Court case, eliminating the degree of proof referred to above. A review of the transcript reveals that in his opening statement (t-12) and Closing (t-189-201) statement, Defendant's counsel stated to the jury that the burden of proof was by a "preponderance of the evidence". Further, Defendant-Appellant made no objection to that portion of the charge dealing with that burden of proof, as required for review under the terms of Ohio Rules of Criminal Procedure, Rule 30. The failure to make such an objection waives any

error not called to the attention of the trial court. As noted by Plaintiff-Appellee, see also, *State v. Glaros*, 170 OS 471, 11 O.Ops 2d 215, *State v. Slone*, 45 O. App. 2d 24, 74 O. Ops 2d 66. The fifth Assignment of Error is not well taken and overruled; the verdict of the jury is affirmed.

Judgment Affirmed

Gray, P.J. and Stephenson, J. Concur

State v. Isaac (Ohio Supreme Court) #77-412

NO. 77-412

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
STATE OF OHIO,
Appellee
vs.
LINCOLN ISAAC,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for PICKAWAY COUNTY

[FILED JULY 20, 1977

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by James R. Kingsley

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Isaac (Ohio Supreme Court) #77-412

No. 77-412

THE SUPREME COURT OF OHIO

[FILED JULY 20, 1977]

THE STATE OF OHIO,

CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
LINCOLN ISAAC,
APPELLANT.

APPEAL FROM THE COURT OF APPEALS FOR PICKAWAY COUNTY

This cause, here on appeal as of right from the Court of Appeals for Pickaway County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Pickaway County for entry.

I, Thomas L. Starzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Bell (CCP Cuyahoga) #16366

THE STATE OF OHIO
vs.
KENNETH L. BELL

A TRUE BILL
INDICTMENT FOR
AGGRAVATED MURDER
2903.01

[FILED Oct. 11, 1974]
***Clerk Stamp Deleted**

Date of Offense: September 15, 1974
The Term of September of 1974
Case No. 16366

THE STATE OF OHIO,
Cuyahoga County

* The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Nathaniel Reese

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Foreman of the Grand Jury

Prosecuting Attorney

NO. 34727

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

[FILED APRIL 8, 1976]

STATE OF OHIO
Appellee
vs.
KENNETH BELL
Appellant

APPEAL FROM
COMMON PLEAS COURT
(Criminal)
No. 16366

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant Kenneth Bell was indicted on October 11, 1974 for aggravated murder, R.C. 2903.01. The indictment alleged that appellant had purposely, and with prior calculation and design, caused the death of Nathaniel Reese. On April 15, 1975, following a trial before a jury, appellant was found guilty of the lesser included offense of murder. R.C. 2903.02.

From his conviction appellant has brought this appeal alleging five assignments of error.

The first and fifth assignments of error allege that the verdict is against the weight of the evidence and that the prosecutor failed to establish the *corpus delicti* and the identity of the victim. Both assignments of error are without merit.

In a criminal prosecution the state is required to prove all material facts relating to the crime charged, including those facts relating to the *corpus delicti*, which is the body or substance of the crime charged. *State v. Manago* (1974), 38 Ohio St. 2d 223. The *corpus delicti* in a homicide prosecution involves two

elements: (1) the fact of death, and (2) the existence of the criminal agency of another as the cause of death. *State v. Manago, supra.* The *corpus delicti* is sufficiently established if the state produces some evidence to support the fact that a human being came to his death by criminal means. *State v. Cosby* (1959), 110 Ohio App. 222. Proof of the identity of the victim is not necessary to establish the *corpus delicti. State v. Schaeffer* (1960), 113 Ohio App. 125; *State v. Cosby, supra.*

In this case the *corpus delicti* was adequately established. Dr. Lester Adelson, Deputy Coroner for Cuyahoga County, testified that he performed an autopsy on September 16, 1974 on a corpse which he had been told was that of Nathaniel Reese. Dr. Adelson testified that the autopsy showed that the individual's death was caused by two gunshot wounds perforating the chest and abdomen leading to massive fatal hemmorrhaging. There were two other non-fatal wounds. His conclusion was that the death was a homicide. The autopsy report, which was introduced into evidence, certifies that the autopsy was performed on the body of Nathaniel Reese. This evidence adequately establishes the *corpus delicti* and the identity of the victim in this case.

Appellant also contends that the verdict was against the weight of the evidence, and that it was not proven that the person allegedly shot by appellant was the same person on whose body the autopsy was performed on September 16, 1974.

It is our conclusion that these contentions are without merit.

The evidence shows that on the evening of September 15, 1974 appellant was at the Willow Inn on East 49th Street drinking with James Clark and several other individuals. At approximately 8:00 p.m. appellant received a phone call from Robert Vaughn, who was a bartender at the Hub Cafe, another bar in the same neighborhood.
Mr. Vaughn told appellant that five black males had entered the Hub Cafe, and that he was afraid that there might be trouble. Appellant and James Clark decided to go to the Hub Cafe in response to the call from Mr. Vaughn. Appellant, who also worked as a bartender, was one of a group of individuals who worked in bars in the area who agreed to call each other for help if it looked like trouble might develop in one of the neighborhood bars in which they worked.

Appellant and Clark proceeded to the Hub Cafe in Clark's car. When they arrived, they saw Robert Vaughn standing outside of the Hub Cafe. Appellant asked Vaughn, "Where are the colored guys?" Vaughn told appellant that they had left the bar and had gone down East 55th Street. Appellant and Vaughn proceeded in the direction that the black men had gone. Near the corner of East 55th and Broadway appellant and Vaughn approached two of the black males. At the time appellant was armed with a .32 caliber pistol. As appellant drew nearer to the men he fired his gun several times. One of the black men fell to the ground.

At trial, appellant claimed that he fired in self-defense. He testified that as he approached the two black men, Vaughn yelled, "He's got a gun," or "Watch out, he's got a gun." At that point, appellant said that he spun around and started shooting. He stated that he did not know where he pointed the gun and that he did not know if he actually shot the victim. He further said that he saw one of black men with a gun.

After the shooting, appellant got back in Clark's car, and put his gun away. As they were leaving the scene, appellant made several statements to Clark, including "I think I killed him," and "It was easy."

The police were called and arrived on the scene at approximately 8:02 p.m. Patrolman George Unger of the Cleveland Police Department found a young black male lying on the sidewalk near East 55th and Broadway. He assisted in putting the individual in a Third District police ambulance wagon, which took the man to St. Alexis Hospital.

Detective John Staimpel of the Cleveland Police Department was summoned to St. Alexis Hospital at approximately 8:25 p.m. to investigate a homicide which had been reported at East 55th, in the vicinity of Broadway. He and his partner arrived at St. Alexis at approximately 8:35 p.m. Upon arrival, Detective Staimpel observed a Third District police station wagon parked outside of the emergency room, with a body in the back. Detective Staimpel followed the Third District wagon from the hospital to the County Coroner's office. He subsequently viewed the body at the morgue. At trial, he identified photographs as being photographs of the body he had escorted from St. Alexis to the County Coroner's office. These same photographs had previously been identified by the Coroner as having been taken in conjunction with an autopsy performed on Nathaniel Reese.

After leaving the scene of the shooting, appellant and James Clark returned to the Willow Inn. Some time later, appellant and James Clark took Clark's car to the area of West Third Street and left it. Clark then called the police and reported that the car had been stolen. A couple of weeks after the shooting appellant went to Florida, leaving his wife and children in Cleveland. He later returned to Cleveland where he was arrested on March 2, 1975.

It is our conclusion that the above evidence could have properly been believed by the jury, and is sufficient to sustain appellant's conviction for the murder of Nathaniel Reese. The first and fifth assignments of error are overruled.

The second assignment of error states that:

> THE TRIAL COURT ERRED UNDER THE FIRST PART OF THE *NOLTON* RULE IN CHARGING THE JURY AS TO LESSER INCLUDED OFFENSES OR, IN THE ALTERNATIVE, UNDER THE SECOND PART OF THE *NOLTON* RULE THE TRIAL COURT ERRED IN THAT IT FAILED TO CHARGE THE JURY AS TO ADDITIONAL LESSER INCLUDED OFFENSES.

This assignment of error is well taken.

In *State v. Nolton* (1969), 19 Ohio St. 2d 133, the Supreme Court of Ohio enunciated a rule to govern trial judges in the instruction of a jury on a lesser included offense of the offense charged in a criminal case. The court stated:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier it would constitute a complete defense to all substantive elements of the crime charged, the trier will not be permitted to consider a lesser included offense for the reason that an unreasonable compromise would be invited on the state's evidence.
>
> On the contrary, if the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused.

Although each of the above paragraphs in *Nolton* appears to set forth a separate test, it has become clear that in determining whether an instruction on a lesser included offense is warranted and required, both paragraphs must be considered together.

State v. Jones, No. 33966 (Cuyahoga County Court of Appeals, December 23, 1975). Thus, although a defendant may present a defense which, if believed, would constitute a complete defense to all substantive elements of the crime charged, an instruction on a lesser included offense or offenses is still warranted and required in cases where the jury, if it chose not to believe the defendant's defense, could reasonably find against the state and for the accused on one or more elements of the crime charged and for the state on the remaining elements, which by themselves would sustain a conviction for a lesser included offense. *State v. Jones, supra.*

In this case appellant was charged with aggravated murder, which is the purposeful causing of the death of another, with prior calculation and design. R.C. 2903.01(A). Appellant presented the defense of self-defense. If believed, this would have constituted a complete defense to the crime charged. However, the evidence in this case was such that the jury, if it chose not to believe appellant, could reasonably have found against the state and for the accused on the element of prior calculation and design, and for the state and against the accused on the remaining elements of the crime charged. Thus, appellant could reasonably have been found guilty of the crime of murder, which is the purposeful causing of the death of another, without prior calculation and design.

The court properly instructed the jury on both aggravated murder and murder.

Appellant also contends that the court, having decided not to limit the instructions to aggravated murder, should also have instructed the jury on the additional lesser included offenses of voluntary and involuntary manslaughter, negligent homicide, and the four categories of assault as set forth in R.C. 2903.111 through 2903.14. It is our conclusion that the trial court properly refused to instruct on these offenses.

Under the *Nolton* rule, an instruction on a lesser included offense or offenses is required only when the evidence is such that the jury could reasonably find against the state and for the accused on one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense. In this case the crime charged against appellant was aggravated murder. It is our conclusion that the evidence was not of such a nature that the jury could reasonably have concluded that appellant was guilty of any

lesser included offense of the crime charged other than murder.

We find no evidence from which the jury could reasonably have concluded that appellant was guilty of voluntary manslaughter, since there is no evidence that appellant caused the death of Nathaniel Reese "while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force." R.C. 2903.03(A). Therefore, an instruction on voluntary manslaughter would not have been proper. The request for such a charge was properly denied.

Similarly, the record does not reveal any evidence from which the jury could reasonably have concluded that appellant was guilty of either involuntary manslaughter or negligent homicide.

Furthermore, since the evidence clearly shows that the victim died as a result of appellant's action, an instruction to the jury on assault would have been improper. *State v. Champion* (1924), 109 Ohio St. 281.

The third assignment of error is that the trial court erred in not granting appellant's motion for a mistrial on the grounds that the prosecutor's conduct during closing arguments prejudiced the appellant's rights.

Appellant contends that the prosecutor on closing argument went into matters which appellant had been precluded from raising at trial, and which the judge had instructed both parties to avoid on closing argument. In particular, appellant contends that the prosecutor brought up the character of the neighborhood in which the killing took place. However, the record reveals that although the prosecutor did briefly comment upon the character of the neighborhood, he did so only with regard to facts which had been testified to or which had been commented upon by defense counsel in his closing argument.

Appellant also contends that the prosecutor impermissibly suggested that certain witnesses who testified against appellant had not gone to the police sooner than they did because they were afraid of appellant. It is our conclusion that such suggestions by the prosecutor were merely in responses to suggestions by defense counsel that the testimony of these witnesses was unreliable because those witnesses had delayed in coming forward. The prosecutor was justified in replying to those suggestions of defense counsel.

Appellant further contends that the court erred in not instructing the jury to disregard the prosecutor's comment that Duane Yingling, appellant's stepson, was "primed and programmed" before testifying on appellant's behalf. However, the record shows that the boy admitted on cross-examination that he had been instructed by his mother as to certain answers to give in response to a particular question. The prosecutor's remark in his closing argument was a proper comment upon the evidence.

Finally, appellant contends that the prosecutor improperly incited the passion of the jury by including vulgarities in his closing argument. Specifically, appellant objects to the prosecutor's characterization of appellant's own testimony as "a bunch of crap." (R. 852). We find that the use of such descriptive language, although clearly out of place in a closing argument before a jury, was not of such a nature as to unfairly incite the passion or prejudice of the jury.

The third assignment of error is overruled.

The fourth assignment of error is that the court erred in excluding evidence of the character of the neighborhood in which the alleged crime took place. This assignment of error is not well taken.

During the trial appellant repeatedly attempted to elicit testimony concerning the character of the neighborhood where the shooting took place. The trial judge, believing the character of the neighborhood to be only marginally relevant to the issues at trial, was reluctant to allow such testimony. Nevertheless, the judge did allow limited inquiry into this area on a number of occasions. It is our conclusion that the judge properly refused to allow further inquiry on other occasions. The character of the neighborhood was not at issue in the trial and was not relevant to the determination of appellant's guilt in regard to the crime charged. The fourth assignment of error is overruled.

Finding none of the assignments of error to be well taken, we affirm the decision of the Common Pleas Court.

[FILED APRIL 8, 1976]
*Clerk Stamp Deleted

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

MANOS, P.J.,
PARRINO, J. and
KRENZLER J. CONCUR.

JOURNALIZED APRIL 19, 1976
GERALD E. FUERST, Clerk of Courts
By Peggy Moguel Deputy

JOHN M. MANOS
Presiding Judge

For plaintiff appellee: John T. Corrigan
For defendant appellant: Harvey H. Starkoff

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

State v. Bell (Ohio Supreme Court) #76-573

NO. 76-573

OHIO SUPREME COURT

[FILED SEPTEMBER 17, 1976]

THE STATE OF OHIO,

CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
KENNETH BELL,
Appellant.

Motion for Leave to Appeal
From the Court of Appeals
for Cuyahoga County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Hughes v. Engle (USDC/NE) #C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED AUGUST 18, 1977]
*Clerk Stamp Deleted

HOWARD HUGHES,
Petitioner
v.
TED ENGLE,
Superintendent of
Chillicothe Correction Institute
Respondent

CIVIL ACTION NO. C77-156A

(Judge Contie)

REPORT AND RECOMMENDED DECISION OF MAGISTRATE

Howard Hughes, the petitioner, initiated this action for habeas corpus relief pursuant to 28 U.S.C. Section 2254 and his request to proceed informa pauperis was granted by the United States District Judge.

Petitioner was indicted by the Grand Jury, September 1974 Term, of Summit County, Ohio for the crime of aggravated murder, in violation of the Ohio Revised Code Section 2903.01(A). The charge included no specifications for the death penalty.

Petitioner plead not guilty to the indictment. In the ensuing trial by jury, petitioner was found to be guilty of voluntary manslaughter, Ohio Revised Code Section 2903.03, a lesser included offense. As a result of said verdict, petitioner was sentenced on January 27, 1975, to a term in the Ohio penal system of from six (6) to twenty-five (25) years (Case No. CR-74-11-1206).

Subsequent to conviction, petitioner appealed to the Court of Appeals Ninth Judicial District. On September 24, 1975, that Court found that the trial was free from prejudicial error and affirmed in all respects (Case No. 7717).

Subsequent to said proceedings, petitioner filed a motion for leave to appeal from the Court of Appeals in the Supreme

Court of the State of Ohio. On March 19, 1976, the Supreme Court of Ohio dismissed said appeal for the reason it failed to present a substantial constitutional question (Case No. 75-1026).

Petitioner is now before this Court seeking federal habeas corpus relief. In support thereof, petitioner alleges:

(1) The prosecution failed to prove that the accused was guilty as to each and every essential element of the offense charged and the trial court failed to so instruct the trial jury.

(2) The petitioner was subjected to highly prejudicial comments by the prosecutor which were not cured by the Court's instructions to disregard them, and the trial court erred in refusing to declare a mistrial on motion by the defense for this reason. (See petition for Writ of Habeas Corpus, page 4)

Under the first claim above, the petitioner alleges that his rights under the Due Process Clause of the Fourteenth Amendment were violated by the trial court's charge to the jury that a defendant must bear the burden of proving self defense. Among other citations, the petitioner relies upon the doctrine of *Mullaney vs. Wilbur*, 421 U.S. 684 (1975), seeking to apply same to the following charge to the jury:

". . . Now the Defendant is presumed innocent until his guilt is established *beyond a reasonable doubt*. The Defendant must be acquitted unless the State produces evidence which convinces you *beyond a reasonable doubt of every essential element of the crime charged in the Indictment*, or *of any lesser offense included within that charge*. . .Now if you find that the State proved beyond a reasonable doubt *all of the essential elements of Aggravated Murder*, your verdict must be guilty of that crime. And in that event you will not consider any lesser offense. . . .If you find that the State *proved beyond a reasonable doubt all of the essential elements of the lesser crime of Murder*, your verdict must be guilty of Murder. And in that event you will not consider any lesser offense. . . Before you can find the defendant guilty of voluntary Manslaughter, you must find beyond a reasonable doubt that Lemuel Johnson was a living person, that his death was caused by the Defendant in Summit County on or about 26th day of October 1974, that the killing was done knowingly, that the act causing the death was performed while the Defendant was under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force . . . *If the Defendant fails to establish the Defense of Self-defense, the*

State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt. If you find that the State *proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges,* and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges. If you find that the State *failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder,* or any of the *lesser included charges,* or if you find that Defendant *proved by a preponderance of the evidence the Defense of Self-defense, then* you must find the Defendant not guilty (TR. Vol. 2 330-343.) (emphasis added).

Both the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court, rejected each of the petitioner's claim on the merits. *Picard vs. Connor,* 404 U.S. 270 (1971).

On October 26, 1974, petitioner, Lemeul Johnson (the victim), Roger Logan, Marie Hubbard and four of her children, and Minnie Jackson were all at the latter's home at 99 Westwood Avenue, Akron, Ohio (TR. 40-41, Vol. 1) when the petitioner without provocation intentionally shot the victim, Lemuel Johnson, twice in the presence of all these witnesses. They all support conclusively that the petitioner in cold blood and without any provocation, deliberately shot and killed Lemuel Johnson (TR. 47-48, Vol. 1).

Testimony further shows that Marie Hubbard and petitioner had a very close relationship (TR. 74-75, Vol. 1) and, in fact, was his former girlfriend. He attempted to pursue an argument with her as to her relationship with new and present friend, Lemuel Johnson, (TR. 74-75, Vol. 1). The said argument was indirectly aimed at Lemuel Johnson (TR. 78, Vol. 1) and urged Marie Hubbard to reveal alleged past conversations he had with her about her current relationship with Lemuel Johnson (TR. 76, Vol. 1). The evidence further reveals that petitioner had been drinking and used abusive and profane language (TR. 75, Vol. 1). It is clearly admitted by the petitioner that he knowingly and purposely carried a deadly weapon on his person, to wit; a gun and had it readily accessible on his person.

The evidence supports beyond any doubt that Lemuel Johnson immediately before he was shot was extending his hand to shake with petitioner as a gesture of friendship (TR. 94-96, 46, Vol. 1) and no hard feelings. The victim's other hand

was at his side. The petitioner refused to shake hands with Johnson (TR. 82, 49, Vol. 1, 79, 96, 256, Vol. 2). The evidence then proceeds to show beyond any doubt that the petitioner was face to face with Johnson (TR. 79, Vol. 1) and about four feet from him (TR. 80 Vol. 1) when he, the petitioner, withdrew his gun from his person and without any cause or provocation whatsoever, intentionally and purposely fired one shot into Johnson (TR. 48, Vol. 1) and as he was falling (TR. 81, Vol. 1), fired another shot into the victim (TR. 81, Vol. 1). Thereafter, the petitioner pointed the gun at Marie Hubbard (TR. 48-49, Vol. 1) and then gave her the gun, left the scene and was apprehended later by the police.

On direct at the trial, petitioner admitted that he shot Johnson twice (TR. 256, Vol. 2). Petitioner said further he either threw the gun down on the floor or Marie Hubbard took it from him and immediately left the scene (TR. 258, Vol. 2). On page 256 of Volume 1, the petitioner makes a feable attempt to lay out his theory of self defense. The following questions were asked on direct and the following answers:

Q. What was your reply to the hand shake?
A. I told him, "I don't shake like that."

Q. All right, What happened next? Go ahead and tell the Jury.
A. He turned and started toward the door.

Q. Then what happened?
A. He turned around and come back, and that's when he was saying, "I'm going to tell you something. . ." And I couldn't understand what he was saying.

Q. What was he doing when he said that?
A. He hit his pocket, and I told him to get back, and I backed off.

Q. Then what happened?
A. I shot and he kept coming, and I shot twice.

Also on page 258, Volume I, the following questions and answers were asked:

Q. What was your state of mind?
A. I went blank. I didn't understand what happened.

Q. Were you surprised at what you had done?
A. Yes, after I had did it.

Otherwise, the record is completely silent as to other testimony of the alleged basis for the self defense theory. In

the alternative, the petitioner through his counsel, attempts to persuade the jury that the evidence at best makes out a crime of manslaughter and not murder.

In summation the defense stated:

> ". . . then it could be voluntary manslaughter only (TR. 315, Vol. 2) . . . As I said to you in my opening statement, this case never was an Aggravated Murder case. It was a way-over indictment. Purposely, with prior calculation and design? No way. Murder? No way. Voluntary Manslaughter? At the most. However, even though purposely—because there's no question. We admit it was an intentional shot. So it was either Voluntary Manslaughter or it was done for self defense (TR. 319, Vol. 2). . .

It is obvious from the above statement that the defense attempted to make the best of both worlds. The jury by its verdict of manslaughter did in fact find no basis of self-defense.

Prior to the Court charging the jury as to the law, on the record the court asked petitioner's attorney, "What areas would you like charge on?" (TR. 287, Vol. 2). The attorney said, "Yes, I would like to have the charge of lesser included offense of Voluntary Manslaughter, Murder, and *Self-defense*" (TR. 288 Vol. 2) (emphasis added). This the Court gave over the objection of the prosecution and at the request of the defense.

Only the element of intent was in issue. Both Marie Hubbard and her children testified as to the events surrounding the shooting and also gave testimony as to a prior incident wherein the petitioner had threatened Johnson.

Ohio Court of Appeals of Summit County, summed up the entire case as follows:

> ". . . Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury had a right, and did find against Defendant's claim of self defense. . .
>
> Our examination of the testimony of the witness in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand. . ."

The transcript fully supports this conclusion.

I

With respect to the first claim for relief, indeed if the facts were to support same, there would be no quarrel that a conviction that rest upon proof that does not establish each and every element of the crime is surely a violation of due process. However, the facts in this case are otherwise crystal clear. *Vachon vs. New Hampshire*, 414 U.S. 478 (1974). It is settled law that allegations as to weight and sufficiency of the evidence, most definitely do not state a constitutional claim and furthermore are not cognizable in federal habeas corpus. *Brooks vs. Rose*, 520 F. 2d 653 (6th Cir., 1975); *Ballard vs. Howard*, 403 F.2d 653 (6th Cir., 1968).

This Court reading the transcript in this case in a light most favorable to the petitioner, is hard put in finding any evidence to support this claim. In fact, the totality of the transcript completely refutes said allegation. *Mullaney vs. Wilbur*, (1975) 420 U.S. 685, 44 L-Ed., 2nd 508. The court held unconstitutional a *Maine* statute which required the defendant to prove by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce a homicide charge from murder to manslaughter. In *Mullaney*, the state did not have the obligation of proving one of the elements of the crime charged therein. It placed that obligation upon the defendant to proof one of the elements of the crime by a preponderance. However, in the event that the defendant did not rebut the element that the state did not have to proof, it became a presumption of law and rested unrebutted. This differs widely with the case before review in that the question raised here is merely and solely a statutory question and is not a constitutional issue as it appears in *Mullaney*. The case before review does in fact require the state to prove each and every material element of the charge beyond a reasonable doubt. Therefore, it is dissimilar to the case of *Mullaney vs. Wilbur*, (supra).

The case before review requires a study of O.R.C. 2901.05, which in pertinent part, reads:

> "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.
>
> "* * *

"(C) As used in this section, an 'affirmative defense' is either of the following:

"* * *

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused on which he can fairly be required to adduce supporting evidence."

Judge Corrigan, dissenting in *State vs. Robinson*, 47 Ohio St. 2d, 103 (1976), stated:

"This statute merely reiterates the common-law principle which places upon the defendant the burden of going forward with an affirmative defense. The statute does not mention the degree of proof required for that affirmative defense, but the requirement of proof by a preponderance of the evidence, for such affirmative defense, has been the common law of Ohio for well over 100 years. Rather, the statute strengthens the defendant's position, if he relies on a defense of excuse or justification pecularily in his knowledge, by mandating that, under such defense, he can *fairly be required to adduce supporting evidence*. It must be borne in mind, also that before a defendant in a homicide case can be required to establish that the killing by him was an unlawful killing within the degree of the crime charged *Taylor v. State* (1909), 12 C.C. (N.S.) 486, 21 C.D. 602."

Further Judge Corrigan stated in Robinson:

"This court has no legislative authority and should not make its duty of expounding statutes a cloak for supplying something omitted from an Act by the General Assembly. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of a statute to meet a situation not provided for. *State, ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65."

Finally, in its' opinion, the majority held, "Because our decision in this case is based upon Statutory Law, one need not consider whether Mullaney might constitutionally mandate a similar result."

Seemingly, the opinion in Mullaney (supra) has been misinterpreted by a significant portion of our legal community and further has been miscontrued.

The underline thesis of *Mullaney* (supra) is clearly stated in *Patterson vs. New York* (1977), 45 U.S.L.W. 4708, 4711-13.

"We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirma-

tive defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.* (emphasis added)

"This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. '[I]t is not within the province of a legislature to declare an individual guilty or presumtively guilty of a crime.' *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916). The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' *Tot v. United States*, 319 U.S. 463, 469 (1943). See also *Speiser v. Randall*, 357 U.S. 513, 523-525, (1958). *Morrison v. California*, 291 U.S. 82 (1934), also make the point with sufficient clarity.

"Long before *Winship* [*In re Winship*, 397 U.S. 358, 364 (1970)], the universal rule in this country was that the prosecution must prove guilty beyond reasonable doubt. At the same time, the long accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required. This was not the problem to which *Winship* was addressed. Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States who strike a different balance are in violation of the Constitution."
"* * *

Mullaney's holding can be distinguished. In *Mullaney* we find a *Maine* statute required the defendant to prove an element of the crime charged otherwise it would be presumed and could be rebutted by the defendant by the preponderance of the evidence. This then is not the case in review here. In the

petitioner's case, the Ohio law does not require the defendant to prove any of the elements of the principle charge or any of its lesser and included offenses. The alleged claim that the charge of Court was in violation of the United States Constitution, is without merit. The mere requirement in a state statute setting forth the requirements of proof as to affirmative defense, and who must go forward in proving same, is solely and completely a statutory issue and does not reach constitutional dimensions.

It is well to note that the latest pronouncements from the high court, seem to clearly point out that the United States Constitution does not forbid the state legislatures from setting forth statutory requirements as to proof in affirmative defenses, so long as the law definitely places the burden on the State or Government to never-the-less prove each and all the necessary elements of a crime charged or its lesser included offenses, beyond a reasonable doubt. It merely becomes a state statutory construction issue and not one involving Due Process of the Fourteenth Amendment of the United States Constitution.

It can be further noted the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not preclude placing upon the criminal defendant the burden of proving an assertion of an affirmative defense. The United States Supreme Court, in *Leland vs. Oregan*, (1952), 343 U.S. 790, held that a statute which cast upon a defendant the heavy burden of proving his insanity beyond a reasonable doubt *did not* violate *due process* where, under other statutory requirements, the state had the burden of proving every element of the crime charged beyond a reasonable doubt, including in the case of first degree murder, premeditation, deliberation, malice and intent. It becomes crystal clear when reading the above charge of the Court herein that the jury was told time and time again the burden of proof placing solely upon the state to prove all the elements of the crime and its lesser included offense by a degree of beyond a reasonable doubt. It further emphasizes that in the event the affirmative defense fails in its proof, the state must *still* prove all of the elements of the crime and the defendant has no burden to prove any of the elements of the crime charged.

Self-defense, insanity and duress falls in a class of defenses that in no way negates the existence of an element of the state's case. Therefore, theoretorically possible for a trier of fact to conclude beyond a reasonable doubt that a defendant has committed a crime but still brings in a verdict of not guilty. In

this kind of defense, the defendant is obviously seeking to avoid punishment by injecting a separate factor and thus proper for him to prove that fact.

Citing for the above, *Leland vs. Oregan*, supra, which upheld constitutionality, a state rule that required defendants to prove the defense of insanity. Further on this subject, Justice Relinquist, in *Wilbur* said he felt *Leland* was still valid because:

> "... the existence or nonexistence of legal insanity bears no necessary relationship of the existence or nonexistence of the required mental element of the crime." 95 S. Ct. at 1893.

Also on this point, the Supreme Court in *Revera vs. Delaware*, (1976), 429 U.S. Section 77, dismissed the case on the grounds that there was no substantial federal question. In the Supreme Court of Delaware in *Revera vs. State*, (1976), 351 A. 2nd. 561, the Court sustained the constitutionality of a state statute requiring a criminal defendant raising an insanity defense to prove mental illness or defect by preponderance of the evidence *Ohio vs. rel. Eaton vs. Price* (1959), 360 U.S. 246, 247.

> "Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balance of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case..."

In view of the above comments, the petitioner's claim, number one, is without merit.

II

With respect to the second claim for relief, the petitioner also contends his right of due process was violated by reason of certain prosecutorial misconduct during the prosecutor's cross examination of petitioner and in his closing argument.

The petitioner identifies the following questions and answers as his basis for said allegation:

> Q. Now where did you but this gun that Mr. Fannelly. . .
> A. I believe, I can't say exactly, but I believe it was about last January, not this January.
> Q. O.K. That was shortly after your M-1 was confiscated.
> (TR. 284)

At this point, the trial court stated to the prosecutor:

> That's an improper question, Mr. Zuch, and I don't want to admonish you again.
> (TR. 284)

At page 285 of Volume 2, at the request of the defendant, the jury was told to disregard those questions. Prior to the above exchange, Gracie Humes testified for the defense concerning the petitioner's good character and propensities for peace. Further, during petitioner's direct testimony, petitioner indicated that he had been convicted of approximately four misdemeanors.

Upon cross-examination, the state attempted to ask questions concerning an incident, one year previous, where the petitioner used an M-1 carbine rifle in an attempt to settle a disagreement over another woman. As this questioning was attempted, the trial court requested the state, out of the presence of the jury, to indicate its justification for area of inquiry. Three alternate grounds were presented: Ohio's other and similar acts doctrine, the fact that petitioner had put his character and non-violent proclivities in issue, and that upon direct examination that petitioner had opened up this avenue for cross-examination. (TR. 271-274). The trial court rejected these alternatives and instructed the prosecutor that he could not go behind any conviction. At page 275 of Volume 2, at the petitioner's request, told jury to disregard those questions.

The quoted question above was asked on recross, after on redirect, the petitioner had testified as to his motivation for owning the gun which he used to shoot Johnson. (TR. 283-285). All objections be defense counsel sustained, and the jury was instructed to disregard the questions (TR. 269, 275, 276, 284). A motion for mistrial was denied on the merits and also not timely made (TR. 289).

Upon appeal the state court said the following on this issue:

> "Defendant, through another witness placed his character in issue by the introduction of testimony as to his good character and peaceful conduct generally. In each instance, the prosecution was not permitted on cross examination to be beyond the conviction of prior violations of law. All special jury instructions requested by the defendant in this area were granted, including the granting of all objections advanced by the defendant during trial. We find no specific acts or conduct of the prosecution, during trial or in final argument, prejudicial to the appellant."

The petitioner isolates from a voluminous record a few alleged improper questions during the prosecutor's cross-examination and in his closing argument. There is a basic and fundamental general rule that the prosecutor may cross-examine a witness on all relevant facts that was or could be developed on direct examination and this also holds for fair argument to the jury by the prosecutor, so long as the arguments are consistent with the facts.

As Chief Justice Burger once wrote, "a criminal trial is not a minuet," *Taylor vs. United States* (D.C. Cir., 1969), 413 F. 2nd. 1095, 1096.

The United States Supreme Court stated in *Berger vs. United States* (1934), 295 U.S. 78, 88, that the prosecutor "may strike hard blows" so long as he avoids foul ones. Courts grant the prosecution enormous discretion in his selection of words so long as the substance of his questions and comments is supported by the record. *United States vs. Jones* (D.C. Cir., 1973), 482 F. 2nd 747, 753 (defendant referred to as an "executioner"; *United States vs. Bivona* (2nd. Cir.), 487 F. 2nd. 443, 446 (defendant's testimony characterized as "lies"); *United States vs. Lucianetti* (E.D. Penn., 1972), 369 F. Supp. 358, 363-64, (defendant referred to as a "liar" and a "crook"). On this issue also see; *Donnelly vs. Di Christofo,* 42 L.W. 4682 (1974); *Smith vs. United States,* 315 A. 2nd (D.C.C.A. 1974).

To add to the fairness of the facts in the instant case, the Judge, with each request to admonish the Jury not to consider those alleged improper questions was so instructed, thereby curing any possible alleged error. The refusal to grant a mistrial rested within the sound discretion of the trial court. *Wallace vs. Havener,* No. 76-1028 (6th Cir., 1977).

Consequently, the prosecutor's cross-examination of the

defendant and the prosecutor's argument to the jury were far short of any dimensions of denying the petitioner's rights under the due process clause of the United States Constitution.

Petitioner is not entitled to a perfect trial but had more than a fair trial, being ably represented by defense counsel. Any attempts by the prosecution to sail into forbidden waters were prevented by the trial court and by defense counsel to the extent that no prejudice resulted.

In view of the above comments, the petitioner's claim, number two, is without merit.

CONCLUSION

In the instant case there has been no showing of an constitutional infringement in statutorily requiring the defense to establish self-defense by a preponderance of the evidence where, as here the jury was repeatedly instructed by the Court in it's charge that the burden rests solely upon the state to prove each and all of the elements of the general charge as well as the elements of any lesser included offenses beyond a reasonable doubt (TR. 330, 331, 336-338, Vol. 2). It further charged the jury that even if the defense fails, the burden *still* remains upon the state to prove each element of the crime beyond a reasonable doubt (TR. 343, Vol. 2).

The charge as to self-defense was merely a statutory issue and does not rise to any constitutional dimensions.

It is also noted that at page 354, Volume 2, the petitioner takes no exception to the charge except as to the subject of Aggravated Murder and murder.

The petitioner was afforded a full and complete charge and the court protected the petitioner's rights of due process as mandated by the United States Constitution.

RECOMMENDATION

It is recommended that the petition for writ of habeas corpus be denied.

Charles R. Laurie
United States Magistrate

CERTIFICATE OF SERVICE

I, Charles R. Laurie, United States Magistrate, do hereby certify that a copy of the *Report and Recommended Decision of Magistrate,* has been forwarded to the Petitioner, at:

HOWARD HUGHES, Reg. No. 140-983
Chillicothe Correctional Inst.
Box No. 5500
Chillicothe, Ohio 45601

via the United States Postal Service on this 18th day of August, 1977.

Charles R. Laurie
United States Magistrate

CERTIFICATE OF SERVICE

I, Charles R. Laurie, United States Magistrate, do hereby certify that a copy of the *Report and Recommended Decision of Magistrate,* has been forward to the Respondent at:

Simon B. Karras
Assistant Atty. General
30 East Broad Street
State Office Tower, Suite 1513
Columbus, Ohio 43215

via the United States Postal Service on this 18th day of August, 1977.

Charles R. Laurie
United States Magistrate

Hughes v. Engle (USDC/NE) #C77-156A

NO. C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED NOVEMBER 27, 1978]
***Clerk Stamp Deleted**

HOWARD HUGHES
Petitioner
vs.
TED ENGLE, Superintendent
Respondent

O R D E R

Petitioner has moved the Court for twenty days leave in which to file a supplemental brief in support of his petition for habeas corpus relief under 28 U.S.C. Section 2254.

With regard to the petition herein, petitioner asserts as his first ground for relief that the state failed to prove beyond a reasonable doubt every element of the crime charged, and that the trial court failed to so instruct the jury. In his subsequent memorandum in support thereof and contra the state's Return of Writ, he explains such ground by alleging that his due process rights were violated by the trial court's instruction placing upon him the burden of proving self defense.

After reviewing the entire record in this action, however, the Court entertains serious reservations with regard to its rightful jurisdiction over said issue. Specifically, it is not clear whether there has been an exhaustion of all available state court remedies with regard to the question raised by ground one. Thus the Court shall grant petitioner leave until November 13, 1978 to submit a brief and whatever other materials he deems appropriate, if any, addressed to exhaustion as required by 28 U.S.C. Section 2254(B) and (c). The state shall be granted an opportunity to respond thereto.

Accordingly, the instant motion is hereby granted to the extent set forth above, and petitioner shall file its brief on or before November 13, 1978. Respondent shall file any response thereto on or before November 20, 1978.

IT IS SO ORDERED.

*Signature Deleted
Leroy J. Contie, Jr.
U.S. District Judge

Hughes v. Engle (USDC/NE) #C77-156A

NO. C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED JUNE 4, 1979]
***Clerk Stamp Deleted**

HOWARD HUGHES
Petitioner
vs.
TED ENGLE, Superintendent
Respondent

O R D E R

Pursuant to this Court's Order of November 2, 1978, petitioner and respondent have submitted briefs addressed to the issue of exhaustion of state remedies as required by 28 U.S.C. Section 2254(b) and (c).

Upon consideration, the Court concludes that petitioner has exhausted available state remedies with regard to both grounds advanced in support of his petition. See *Keener v. Ridenour*, 594 F. 2d 581 (6th Cir. 1979); *Collins v. Perini*, 594 F. 2d 592 (6th Cir. 1979).

In their respective briefs, petitioner and respondent have each requested leave to file a further brief addressed to the merits of petitioner's claims for relief.

Accordingly, the parties herein shall file briefs addressed to the merits of the grounds advanced in support of the petition on or before June 18, 1979.

IT IS SO ORDERED,

*Signature Deleted
Leroy J. Contie, Jr.
U.S. District Judge

State v. Hughes (CCP Summit) CR-74-11-1206

STATE OF OHIO SUMMIT COUNTY

NO. 74-11-1206

INDICTMENT FOR: AGGRAVATED MURDER (1)

[FILED DECEMBER 16, 1974]
REVISED CODE SECTION: 2903.01(A)

In the Common Pleas Court of Summit County, Ohio, of the term of September in the year of our Lord, One Thousand Nine Hundred and Seventy-Four.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, being duly impanelled and sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

DO FIND AND PRESENT, that HOWARD HUGHES on or about the 26th day of October, 1974, at the County of Summit, aforesaid, did commit the crime of AGGRAVATED MURDER in that he, did, purposely and with prior calculation and design, cause the death of Lemuel W. Johnson, in violation of Section 2903.01(A) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

STEPHAN M. GABALAC
Prosecuting Attorney
Summit County, Ohio

MARY F. ROSSI
Foreman of the Grand Jury

A TRUE BILL

[288]

MR. FANELLY: Yes. I would like to have the Charge of the lesser included offenses of Voluntary Manslaughter, Murder and Self-defense.

THE COURT: Do you care to be heard on that, Mr. Prosecutor?

MR. ZUCH: One second, your Honor. Your Honor, we'd merely like to bring to the Court's attention State vs. Nolton, as regards the Charge of when Self-defense is raised. The State maintains that the law supported by that particular case states that when self-defense is presented that the—there's no lesser included offenses. They are saying that he's completely justified in the act, and that self-defense is in and of itself an essential element of the crime.

THE COURT: Overruled. I'm going to charge on the lesser included of Murder and Voluntary Manslaughter.

MR. FANELLY: Your Honor, I'd like to at this time make a motion. I'd like to ask the Court to declare a mistrial based on the statements made by Prosecutor Zuch referring to the M-1 rifle and that that had been made but for one purpose; to prejudice the mind of the Jury, and that it

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perhaps would lead them to believe that this man may be involved with the Black Muslems, or something of that sort. It was indeed a very improper question. I'm sure Mr. Zuch is a very seasoned Prosecutor, and he should have known that was an improper question. So at this time—

THE COURT: Mistrial is overruled, not only on the merits of your motion but the timeliness of it. It was not made at the time of the transgression. You may have your exception.

MR. FANELLY: Thank you, your Honor.

THE COURT: Anything else, Mr. Fanelly?

MR. FANELLY: No.

MR. KIRKWOOD: I take it the Charge will be Aggravated Murder, Murder, Voluntary Manslaughter, with the Self-defense extra?

THE COURT: Right. Anything else any of you want charged on?

MR. FANELLY: You will have all the boiler plate things, I'm sure.

THE COURT: Right. Time of argument. Now, it's my policy to allow you whatever time you want within reason, but hold you to the time allotted. What is your pleasure?

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(Whereupon, at 9:58, the morning recess was had.)

CHARGE OF THE COURT

Ladies and gentlemen of the Jury: You have heard the evidence and the arguments of Counsel, and it is now my duty to instruct you on the law which applies to this case. The Court and the Jury have separate functions. You decide the disputed facts and the Court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

A criminal case begins with the filing of an Indictment. The Indictment informs the Defendant that he has been charged with a crime. The fact that it was filed may not be considered for any purpose. The plea of not guilty is a denial of the charge and puts in issue all of the essential elements of the crime. The Defendant raises the issue of Self-defense, which I will explain to you later.

Now, the Defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The Defendant must be acquitted unless the State produces

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in evidence.

The emotional stress or condition must be extreme. That is, it must be great in nature and intensity, and it must exist at the time of the act or acts that caused the death of Lemuel Johnson.

However to reduce a purposeful murder to Voluntary Manslaughter the extreme emotional stress must be brought on by serious provocation. Provocation, to be serious, must be reasonably sufficient to bring on the extreme emotional stress, and the provocation must be reasonably sufficient to incite or to arouse the Defendant into using deadly force.

In determining whether the provocation was reasonably sufficient to incite the Defendant into using deadly force, you must consider the mental and emotional state of the Defendant,

and the circumstances and conditions that surrounded him at that time.

When a person knowingly kills another while under extreme emotional stress brought on by serious provocation reasonably sufficient to cause him to use deadly force to kill another, then such killing is Voluntary Manslaughter.

If the emotional stress is not extreme, or if such stress is not present at the time of the act, or if the provocation is not reasonably sufficient to cause the

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Defendent to use deadly force or knowingly kill the decedent, then such killing was not Voluntary Manslaughter.

Now, the Defendant claims that what he did was justified on the basis of self-defense. And this defense applies to not only the charge of Aggravated Murder, but the lesser included charges which I have described to you.

If a person is assaulted by another who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and may kill his assailant if it reasonably appears to the Defendant to be necessary to do so.

To constitute Self-defense there must have been on the part of the Defendant a careful use of his faculties and reasonable grounds to honestly believe that there was an imminent danger to his person or to his life. There must have been a sufficient act coupled with an apparent present ability to carry it out to cause the Defendant to reasonably believe that the other parties intended to kill him or to do great bodily harm, and that the killing of the decedent was necessary to save himself from death or great bodily harm.

If the Defendant had reasonable grounds and an honest belief that he was in imminent danger of death or great bodily harm, and that the only means of escape

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from such danger was by killing his assailant, then he was justified even though he was mistaken as to the existence of such danger.

Resort to the use of a dangerous weapon is not permitted because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a dangerous weapon.

In determining whether the Defendant had reasonable grounds for an honest belief that he was in imminent danger, you must put yourself in the position of this Defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of the decedent and determine if his acts and words caused the Defendant to reasonably and honestly believe that he was about to be killed or receive great bodily harm.

The law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances, and if the force used is so grossly disproportionate to his apparent danger as to show revenge or an evil purpose to injure his assailant, then the Defense of Self-defense is not available.

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The Defendant must establish that the other party was the aggressor and that the Defendant did not himself provoke and cause the injury. The plea of self-defense is not available to the person who starts a fight unless in good faith he withdraws from the contest and informs the other party of his withdrawal, or by words or acts reasonably indicates he has withdrawn and is no longer participating in the fight.

A Defendant is not in a position to claim self-defense if he thought trouble and armed with a dangerous weapon he provoked a fight or renewed a fight that had broken off and did not attempt to avoid it or leave the scene of trouble.

If, in the careful and proper use of his faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of his adversary's position was released from danger, and the right to use force in self-defense ended. If thereafter the Defendant continues he becomes the aggressor and a subsequent injury to another is unlawful.

The burden of proving the Defense of Self-defense is upon the Defendant. He must establish such Defense by a preponderance of the evidence.

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Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed

to it. In determining whether an issue has been proved by a preponderance of the evidence you should consider all of the evidence regardless of who produced it.

If the Defendant fails to establish the Defense of Self-defense, the State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt.

If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges, and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges.

If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder, or any of the lesser included charges, or if you find the Defendant proved by a preponderance of the evidence the Defense of Self-defense, then you must find the Defendant not guilty.

As I indicated, if the evidence warrants it, you may [344] find the Defendant guilty of a crime lesser than that charged in the Indictment. However, not withstanding this right, it is your duty to accept the law as given you by the Court, and if the facts and law warrant a conviction of the crime charged in the Indictment, then it is your duty to make such finding uninfluenced by your power to find a lesser offense.

The provision allowing you to find a person guilty of a lesser included offense is not designed to relieve you of the performance of an unpleasant duty. It is included to prevent failure of justice if the evidence fails to prove the original charge, but does justify a verdict for a lesser crime.

Now, you will have with you in your Jury Room one verdict form, which will cover all the possible results you may arrive at. I think it's self-explanatory but I'll go over it with you.

It starts off by saying, "We, the Jury in this Case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the defendant, Howard Hughes, do find him blank of Aggravated Murder." That's the first charge you will consider, and if you find him guilty of Aggravated Murder then you needn't worry about the rest of

the form. But if you find him not guilty of Aggravated Murder then you

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and that each juror has the opportunity to discuss the case and to cast his vote. Otherwise the authority of the foreman is the same as any other juror.

Until your verdict is announced in open court you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

If Counsel has any request for additional Charge or objection to the Charge, you can approach the bench.

MR. FANELLY: May we approach the bench, please?

(Discussion between the Court, Mr. Fanelly and Mr. Zuch at the bench, out of the hearing of the Jury and Reporter, off the record.)

THE COURT: I think I had covered it, but to make sure that you understand, it's been requested that I indicate to you that if you find that the Defense of Self-defense has been proven then you should return a verdict of not guilty on the Aggravated Murder, and all the lesser included charges, which would constitute an acquittal.

All right, Mr. Fanelly?
MR. FANELLY: Thank you, your Honor.
THE COURT: Okay. You may now retire.

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There's a chance you wouldn't reach a verdict by noon, and the law requires that once you get a criminal case that you must—that you cannot be separated during the lunch hour, which means that you will have to go to lunch in a body under the charge of the Bailiff and the Jury Commissioner. So I'll have the Bailiff check in with you about 11:30 or so and see whether you're going to need arrangements for lunch or not.

So with that you can retire and commence your deliberations.

(Whereupon, at 10:56 a.m., the Jury retired to begin deliberations.)

(Whereupon, the following was had in open court, out of the presence of the Jury:)

THE COURT: Let the record show that when the Court invited Counsel to approach the bench for objections to the Charge, Mr. Fanelly, out of the hearing of the Jury, made an objection, which I will let you now state into the record.

MR. FANELLY: Yes. Thank you, your Honor. Off the record, a minute.

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(Discussion off the record.)

MR. FANELLY: First of all, may I say for the record that I'm going to object to the entire Charge in its entirety, but for one purpose. We are operating now under a new code in which many things are uncertain. So for the preservation of the record at this time, in view of the fact that this is something new, and particularly going to the elements of purposely, with prior calculation and design, I will at this time on the elements of that Aggravated Murder, Murder and Voluntary Manslaughter, object to the Charge in its entirety.
I specifically—oh. That's in generalities.

Now, specifically, I object to the Charge of Voluntary Manslaughter in that if you read in the code, I'm certain that the way the Court dictated his Charge under Voluntary Manslaughter, that we as lawyers and the Court understands the same, but we must take into consideration that the Charge is given to lay people.

The code puts it in this way: "Even if the death was purposely caused, the Defendant may be entitled to a Charge on the lesser included offense

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of Voluntary Manslaughter, where he was under emotional stress, because proof of purpose also includes proof of knowledge." Under 2901.22.

In other words, there is such a gray area today. In the old days, under Manslaughter, it was defined as hot blood. We no longer have that Charge, so that Murder is the mere purposefully taking of a life, which is intentional.

Now, Voluntary Manslaughter is a gray area under our new code, so that even though it may be purposely, which could be Murder or could be Voluntary Manslaughter, I believe that the way the Court gave his Charge, it was in reverse and not quite as understandable to a lay individual, in that if the Court at my request would have again said, even if the death was purposely caused—which is the element and the only element of Murder—the Defendant may be entitled to a Charge on the lesser included offense of Voluntary Manslaughter, where he was under extreme emotional stress.

In other words, the Court saw fit to grant that Charge, so it's no longer "may", it's mandatory. So that the Court should have given it in this fashion, as it's set out in the code, but perhaps elucidate to the Jury as to the fact that although

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in Murder all that is required is the purposeful killing, however if it's done under emotional strain or stress—extreme emotional strain or stress—it is elucidating on the point that I hope to try to make today.

Now, your Honor, do you have your Charge there? In other words, to finish, the Court did touch upon it, but in a reverse fashion which would not be as greatly understood by a lay individual as His Honor or I or the Prosecutor would understand.

For example, the Court in his Charge started out under Voluntary Manslaughter, which was the first comment, and then he goes on into emotional stress. The Court said as follows: The emotional stress or condition must be extreme. I don't argue with that; that is, that it must be great in nature and intensity, and it must exist at the time of the act or acts that caused the death of the decedent. However, to reduce a purposeful Murder to Voluntary Manslaughter—now he's covering it at this point—the extreme emotional stress must be brought on by a serious provocation. Now he has in that way said it but in reverse, so that if it would be said as the Code fits it, that even though the act—or the cause of death was purposely, if it was done

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under emotional strain and stress, extreme stress, then, of course, it should be considered as Manslaughter.

So that although he has touched upon it it is much more clear and understandable to a lay individual as set forth in the Code, and I would be under the impression that we should

follow the definition as set forth under the Code, particularly under the new provision.

Excuse me. Off the record a minute.

MR. ZUCH: Well, for the record, I would like to say that the State has no idea what Mr. Fanelly is talking about.

THE COURT: I think when you say the Code, you're not reading from the Code, you're reading from some Comment on—

MR. ZUCH: The only way the State would like to respond to that, your Honor, is that that is a declaration of what in fact are lesser included offenses. That's not the text of the Statute, that's an annotation in a book that's put out by the Program of Continuing Legal Education.

What that paragraph that was read by Mr. Fanelly means, I believe, is whether or not to in fact give the Charge of Voluntary Manslaughter or not. It

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certainly doesn't change the culpable mental state, if in fact that's what he's referring to.

THE COURT: I think what you're saying is, I did it but not as well as you could have done it.

MR. FANELLY: No, not that at all. This is something new, and I'm not even sure, but I felt that the way the book here explained it it was a little more clear, because, you see, Murder is merely the purposeful taking of a life. And yet it can still be purposeful, and if under extreme emotional stress it would be considered Voluntary Manslaughter.

THE COURT: You may have your exception.

MR. FANELLY: Thank you.

MR. ZUCH: Does the Defense Counsel have any other objection to any other portion of the Charge?

MR. FANELLY: I have in generalities made an objection to the Charge insofar as the new Code, pertaining to Aggravated Murder, Murder and Voluntary Manslaughter, because it's so new, in generalities, to protect the record.

THE COURT: Okay.

MR. FANELLY: Thank you, your Honor.

State v. Hughes (CA Summit) #CA 7717

STATE OF OHIO
Summit County

STATE OF OHIO
Plaintiff-Appellee
v.
HOWARD HUGHES
Defendant-Appellant

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(September Term, 1975).

C.A. No. 7717

APPEAL FROM JUDGMENT
ENTERED IN THE COURT
OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO
CASE NO. 74 11 1206

DECISION AND JOURNAL ENTRY

DATED: September 24, 1975.

This cause was heard September 9, 1975, upon the record in the trial court and the briefs. It was submitted to the Court with out oral argument. The assignments of error were reviewed by the court and the following disposition made:

BRENNEMAN, J.

Defendant was charged with aggravated murder, R.C. 2903.01. A plea of not guilty was entered and the cause was tried to a jury. A verdict of not guilty of aggravated murder, not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter was returned. A new trial was denied, and this appeal was thereafter timely filed.

These errors are claimed in support of this appeal:

"1. The jury's verdict was against the weight of the evidence.

"2. The prosecutor committed various acts of misconduct and not only in the trial of this cause but in his final argument.

"3. The court abused its discretion by its refusal to declare a mistrial due to the misconduct of the prosecutor.

In the afternoon of October 26, 1974, one Marie Hubbard, her four children, and one Roger Logan, Lemuel Johnson and Howard Hughes were all congregated at the home of Minnie Jackson. In addition to conversation, the record shows the defendant Hughes was argumentative concerning the relationship between Lemuel Johnson and Marie Hubbard in that the defendant Hughes was formerly a boy friend of Marie Hubbard, and that for some time prior to October 26, 1974, Lemuel Johnson had been keeping company with Marie.

As the conversation progressed, Hughes became more angry and aggressive in his language concerning Lemuel Johnson and Marie Hubbard. One of the children noticed a gun in Hughes' coat pocket. Johnson was not armed. The evidence established that Johnson sought to make peace, and extended his hand to Hughes in a gesture of friendhip saying, "Let's shake and be friends." Hughes refused, and thereupon fired two shots at Johnson, killing him.

At trial Hughes claimed self-defense.

The jury had sufficient evidence before it, including the testimony of the defendant, who testified to support his own defense. Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury has a right, and did find against defendant's claim of self-defense. See State v. Cliff, 19 Ohio St. 2d 31.

Defendant, through another witness placed his character in issue by the introduction of testimony as to his good character and peaceful conduct generally. In each instance, the prosecution was not permitted on cross-examination to go beyond the conviction of prior violations of law. All special jury instructions requested by the defendant in this area were granted, including the granting of all objections advanced by the defendant during trial. We find no specific acts or conduct of the prosecution, during trial or in final argument, prejudicial to the Appellant. See *State v. Elliot*, 25 Ohio St. 2d 249.

For this reason, we reject Errors No. 2 and No. 3 as both are cumulative as to each other.

Our examination of the testimony of the witnesses in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand. We do not attempt to reconcile the verdict, except to determine if the trial was free from prejudicial error, and we find no error of that character.

Judgment Affirmed.

The court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

WILLIAM H. VICTOR
Presiding Judge
—For the Court—

VICTOR, P.J. and
MAHONEY, J. CONCUR.

APPEARANCES:

STEPHAN GABALAC, Summit County Prosecutor, (Frederic L. Zuch, Asst. Prosecutor), 53 East Center Street, Akron, Ohio 44308, For Plaintiff-Appellee.

ANGELO A. FANELLY, Attorney at Law, 930 Centran Building, Akron, Ohio 44308, for Dependant-Appellant.

State v. Hughes (Ohio Supreme) #75-1026

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
THE STATE OF OHIO,
Appellee,
vs.
HOWARD HUGHES,
Appellant.

1976 Term
To wit: March 19, 1976

No. 75-1026
MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Summit County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Hughes (Ohio Supreme) #75-1026

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
THE STATE OF OHIO,
Appellee.
vs.
HOWARD HUGHES,
Appellant.

1976 Term
To wit: March 19, 1976

No. 75-1026
APPEAL FROM THE COURT OF APPEALS

for Summit County

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Joint Appendix have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this ____ day of June, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
COUNSEL OF RECORD

Cm

CASE NO. 80-1430

RECEIVED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Superintendent
Chillicothe Correctional Institute
Petitioner

-v-

Lincoln Isaac, et al.
Respondents

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND FOR APPOINTMENT OF COUNSEL

First, Respondent Lincoln Isaac, who is currently residing at 310 Ray Avenue, Circleville, Ohio, and who was paroled from the Chillicothe Correctional Institute asks leave to file the attached Brief in Opposition to Certiorari to the United States Court of Appeals for the Sixth Circuit without payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this motion is attached hereto.

Second, Respondent Lincoln Isaac further asks this court to appoint James R. Kingsley as his counsel and to reimburse him pursuant to Rule 46.7.

James R. Kingsley

James R. Kingsley
Attorney for Lincoln Isaac
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

D

RECEIVED
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SUPREME COURT, U.S.

CASE NO. 80-1430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Superintendent
Chillicothe Correctional Institute
Petitioner

-v-

Lincoln Isaac, et al.
Respondents

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

STATE OF OHIO)
)SS:
COUNTY OF PICKAWAY)

I, Lincoln Isaac, being first duly sworn, depose and say in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, states that:

1. I am the Respondent in the above-entitled action.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The United States District Court for the Southern District of Ohio, Eastern Division, and the Sixth Circuit Court of Appeals have previously granted me in forma pauperis status.

5. I believe that I am entitled to the favorable decision granting a writ of habeaus corpus to me in the Sixth Circuit Court of Appeals en banc.

6. I am well satisfied with the representation rendered me by James R. Kingsley, Attorney At Law, in the prior proceedings, and I desire that he continue to represent me, but I am without funds to pay him.

7. I have not paid James R. Kingsley, nor any of his associates, for pursuing my writ of habeaus corpus, nor for any of the ensuing appeals to-date.

8. I further swear that the responses which I have made to the following questions are true:

Q) Are you presently employed?

A) Yes. Self-employed-service septic tanks at my residence of 310 Ray Avenue, Circleville, Ohio. I grossed $4,436 in the year 1980, $400 in January, 1981 and $400 in February, 1981.

Q) Have you received within the past twelve months any income in the form of rent payments, interest, dividends, or other source?

A) Interest on CD in trust 1980-$348.

Q) Do you own any cash or checking or savings account?

A) Cash-$200; Personal Checking-$190; Savings-$50.

Q) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A) 1957 Chevrolet Truck (inoperable), 1972 Dodge (mtg.), 1968 International (mtg.), 1970 Ford Pickup (mtg.), 1969 Cadilac (mtg.).

Q) List the persons who are dependent upon you for support and state your relationship to those persons.

A) Just myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

x Lincoln Isaac
Lincoln Isaac

Sworn to and subscribed in my presence this 16th day of March, 1981, at Circleville, Ohio.

(SEAL)

James R. Kingsley

JAMES R. KINGSLEY
NOTARY PUBLIC—STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

RECEIVED
MAR 21 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 80-1430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Superintendent
Chillicothe Correctional Institute
Petitioner

-v-

Lincoln Isaac, et al.
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES R. KINGSLEY
Attorney At Law
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

ATTORNEY FOR RESPONDENT,
LINCOLN ISAAC

Best Copy Available

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QUESTIONS PRESENTED

1. DOES THE WAINWRIGHT V. SYKES CAUSE/PREJUDICE TEST APPLY TO A RETROACTIVE CHANGE IN THE LAW?

2. ONCE THE HIGHEST COURT OF A STATE IN ITS SYLLABUS DECLARES A CHANGE IN LAW TO BE RETROACTIVE, CAN IT USE A PROCEDURAL "COTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN DEFENDANT'S TRIAL RECORD DEMONSTRATES THE CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

3. ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED ON A STATE PROCEDURAL RULE?

4. WHEN TWO DEFENDANTS ATTEMPT TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE, ONE AT A JURY TRIAL AND THE OTHER AT A COURT TRIAL, THEN SUBSEQUENTLY THE HIGHEST COURT OF THE STATE DECLARES THE BURDEN TO BE ERRONEOUS, AND THE CHANGE TO BE RETROACTIVELY APPLIED, IS THE GRANTING OF A NEW TRIAL ONLY TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE COURT ALONE AND THE BARRING OF A NEW TRIAL TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE JURY BECAUSE HE FAILED TO OBJECT TO THE JURY INSTRUCTIONS, A DENIAL OF EQUAL PROTECTION OF THE LAW?

5. WHEN TWO DEFENDANTS, AT SEPARATE TRIALS, ATTEMPT TO PROVE AFFIRMATIVE DEFENSES BY A PREPONDERANCE OF THE EVIDENCE, AND BOTH FAIL TO OBJECT TO JURY INSTRUCTIONS, IS THE APPELLATE COURT'S FINDING THE FAILURE TO OBJECT TO BE PLAIN ERROR IN ONE TRIAL, BUT NOT THE OTHER, A DENIAL OF EQUAL PROTECTION OF THE LAW?

6. DOES DUE PROCESS OF LAW FORBID A CONVICTION WHERE A JURY IS INSTRUCTED THE DEFENDANT HAS THE BURDEN TO PROVE SELF-DEFENSE WHEN THE HIGHEST COURT OF THE STATE DECLARES THAT THE DEFENDANT HAD NO SUCH BURDEN?

7. IS IT A DENIAL OF DUE PROCESS OF LAW TO REQUIRE A DEFENDANT TO PROVE SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE?

8. IS THE REFUSAL OF THE HIGHEST COURT OF THE STATE TO FIND "PLAIN ERROR" IN CASES PENDING ON REVIEW WHEN IT CHANGES THE LAW IN A CONSTITUTIONALLY PROTECTED AREA AND THEN DECLARES THE CHANGE TO BE RETROACTIVE A VIOLATION OF DUE PROCESS OF LAW?

STATUTES INVOLVED

Criminal Rule 30, INSTRUCTIONS.

At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the request. Copies of such request shall be furnished to all other parties at the time of making such request. The court shall inform counsel of its proposed action upon the request prior to the arguments to the jury, but the court shall not instruct the jury after the arguments are completed. The court need not reduce instructions to writing.

No party may assign as error any portion of the charge or admission

therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds to his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Criminal Rule 52(b), PLAIN ERROR.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Lincoln Isaac went unanounced to pick up his ex-wife, who worked at a bar. He claimed her boyfriend, who drove up at closing time, sucker punched him first and that he acted in self-defense when he got the winning end of the ensuing fight.

There was no evidence except the testimony of the defendant and the victim as to who threw the first punch.

Pursuant to Ohio Revised Code 2901.05, in effect at the time of this trial, the court charged that the defendant had to prove, by a preponderance of the evidence, he acted in self-defense. The defendant did not object to the jury instructions given.

The defendant was found guilty of a lesser included offense of Aggravated Assault and was sentenced to the Ohio Penitentiary for a period of six months to five years.

The defendant appealed. While in the Fourth District Court of Appeals, the State of Ohio decided the case of State v. Robinson, 47 Ohio St. 2d 103 (1976), 351 NE 2d 88. It was declared that the State not only bore the burden of proof beyond a reasonable doubt of all statutory elements of the crime, but also had to prove the nonexistence of an affirmative defense, once raised by sufficient evidence.

Defendant argued that Robinson required the granting to him a new trial. The Court of Appeals found Criminal Rule 30 barred him relief because he had not objected to the jury instructions.

On appeal to the Supreme Court of Ohio, the defendant argued, among other things, Criminal Rule 30 could not bar review of his case; failure to object was plain error, and Robinson should be applied retro-

actively.

The Supreme Court, in State v. Humphries, 51 Ohio St. 2d 95 (1977), 364 NE 2d 1354, simultaneously declared Robinson was to be applied retroactively, but denied defendant's leave to appeal.

The defendant filed a habeas corpus in the U.S. District Court, which found that he was barred by Criminal Rule 30. The U.S. Court of Appeals for the Sixth Circuit found the application of Criminal Rule 30 to be arbitrary and capricious and granted the writ of habeas corpus. The en banc panel affirmed.

REASONS FOR DENYING THE WRIT

I. Response to Petitioner's Concerns

Petitioner's statements as to the number of persons affected by the decision is speculation. If it is true, only twenty-five "live" cases are in existence, then only twenty-five cases will have to be retried. Respondent believes frotnote 8 of Hankerson v. North Carolina, 432 U.S. 233 (1977), states Rule 30 can bar retrials for cases that were not still on appeal at the time of the Robinson decision. Respondent does not believe that the decision specifically ignores footnote 8 as petitioner states.

The decision in the case at bar is not in conflict with the case of Cole v. Stevenson, 620 F 2d 1055 (4th Cir. 1980). In that decision the failure to object was not a result of the highest court of a State declaring a principle of law to be retroactive. The defendant had failed to raise the issue on appeal. Here Isaac did raise it.

The decision does not rewrite the law of Ohio as alleged by petitioner. State v. Abner, 55 Ohio St. 2d 251 (1978), 379 NE 2d 228, did modify Robinson, in that it held that the State need not disprove an affirmative defense once raised. However, it did not state that under the statutes in existence at that time the defendant had to prove self-defense. See State v. Chase, 55 Ohio St. 2d 237 (1978), 378 NE 2d 1064. The rather nebulas holding of the Court appeared to be that there is no burden, hence merely going to reasonable doubt. Even under the law as changed

in State v. Abner, Lincoln Isaac would be entitled to a new trial because he had to prove something that the State declared he had no burden to prove. What the decision in the case at bar does is to require the State of Ohio to try the defendant under the law that the State chose to rewrite.

Petitioner's contention that this decision nullifies the holding of Wainwright v. Sykes is unfounded. Petitioner interprets the en banc decision that any subsequent decision that was not anticipated is cause. Such a statement begs the point. A subsequent decision need not be made retroactive.

Finally, petitioner alleges that this is strictly a state law concern, and there was unnecessary federal interference with a concern of the State. Petitioner appears to be arguing that burden of proof in a criminal trial is not a federally protected concern, and the State may define who has the burden of proving what at its whim. Patterson v. New York, 432 U.S. 197 (1977), does not go so far to allow this to happen.

II. Grounds Supporting Isaac's Retrial

A. Due Process/Retroactivity.

1. DOES THE WAINWRIGHT V. SYKES CAUSE/PREJUDICE TEST APPLY TO A RETROACTIVE CHANGE IN THE LAW?

2. ONCE THE HIGHEST COURT OF A STATE IN ITS SYLLABUS DECLARES A CHANGE IN LAW TO BE RETROACTIVE, CAN IT USE A PROCEDURAL "COTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN DEFENDANT'S TRIAL RECORD DEMONSTRATES THE CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

3. ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED ON A STATE PROCEDURAL RULE?

Respondent has always viewed one of the major issues in his case as what is the legal consequence of a court using the term of art "retroactive."

Appellee believes that due process of law requires a jury be properly charged as to the burden of proof existing at the time of his trial. What that law is depends on the decisions of the highest court of state or of the Supreme Court of United States.

Once the Supreme Court of Ohio decided that the Ohio law that applied to the burden of proof of an affirmative defense was wrong, it then could make a constitutional choice: (1) declare the change prospective only, (2) declare the change limited retroactive for those cases on appeal, or (3) make the decision fully retroactive in the case at bar to January 1, 1974.

The Supreme Court of Ohio consciously, in its syllabus, declared the change fully retroactive.

By doing so, the court, by implication, also found the impact on justice not to be so onerous, and also found it was fundamentally unfair to let convictions stand under law that did not exist. P.E. Electric Co. v. Bowers, 164 Ohio St. 209 (1955), 129 NE 2d 467. Otherwise, the Court would have declared the decision prospective only.

Ohio Criminal Rule 30 is not part of, nor can it be interposed as a bar to, a new trial under a change in a constitutionally protected area declared to be retroactive. Defendant can show, by his trial record, that the change was raised (self-defense was an issue), and the change materially affected the outcome of his case. He is entitled to a new trial.

In denying Respondent a new trial, Ohio did not follow its own law. Ohio does not define as retrospective applying a change in the law to a case pending on appeal. State v. Lynn, 5 Ohio St. 2d 106 (1966), 214 NE 2d 226.

Ohio has allowed retroactive application and a new trial when counsel did not object State v. Cowans, 10 Ohio St. 2d 92 (1967), 227 NE 2d 55. Ohio's position of denying retroactive application in other cases has been critized. See the dissent in State v. O'Conner, 6 Ohio St. 2d (1966) at page 183, 217 NE 2d 285 at page 689.

The State of Ohio desires this Court to accept this case for review in hopes that it will declare the Wainwright v. Sykes cause/prejudice test as a bar to the Federal Court's reviewing how the Supreme Court of Ohio has treated the constitutionally protected area of burden of proof.

This en banc panel declared: (1) the burden of proof is, in a criminal case, a part of federal due process of law, (2) a retroactive change in the law cannot be foreseen, (3) once a retroactive change is made in a constitional area, the rationale of Wainwright v. Sykes to bar review of the application that change is inapplicable, and (4) a rule requiring one to object to laws that did not exist at the time is arbitrary and capricious.

To agree with petitioner is to state when Ohio declares a change in law to be retroactive, be it in a constitutionally protected area or otherwise, federal review will never lie because one will never object to the law that was proper at the time of the trial.

B. Equal Protection.

> 4. WHEN TWO DEFENDANTS ATTEMPT TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE, ONE AT A JURY TRIAL AND THE OTHER AT A COURT TRIAL, THEN SUBSEQUENTLY THE HIGHEST COURT OF THE STATE DECLARES THE BURDEN TO BE ERRONEOUS, AND THE CHANGE TO BE RETROACTIVELY APPLIED, IS THE GRANTING OF A NEW TRIAL ONLY TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE COURT ALONE AND THE BARRING OF A NEW TRIAL TO THE DEFENDANT WHO WAS FOUND GUILTY BY THE JURY BECAUSE HE FAILED TO OBJECT TO THE JURY INSTRUCTIONS, A DENIAL OF EQUAL PROTECTION OF THE LAW?
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> 5. WHEN TWO DEFENDANTS, AT SEPARATE TRIALS, ATTEMPT TO PROVE AFFIRMATIVE DEFENSES BY A PREPONDERANCE OF THE EVIDENCE, AND BOTH FAIL TO OBJECT TO JURY INSTRUCTIONS, IS THE APPELLATE COURT'S FINDING THE FAILURE TO OBJECT TO BE PLAIN ERROR IN ONE TRIAL, BUT NOT THE OTHER, A DENIAL OF EQUAL PROTECTION OF THE LAW?

Respondent is also entitled to a new trial because he was denied equal protection of the law. State v. Humphries declared Robinson retro-active. In the same decision State v. Myers was decided. Humphries had a jury decide his guilt or innocence; Myers had the Judge do so. The Supreme Court of Ohio held Criminal Rule 30 did not apply to court trials.

The absurdity of this reasoning shows the arbitrary and capricious nature of Criminal Rule 30. Obviously the trial Judge in Myers believed Myers had to prove self-defense by a preponderance of the evidence. Myers was convicted under the wrong law. He got a new trial. The jury

in Humphries also convicted him under the wrong law. He did not get a retrial.

Why should the exercise of one's constitional right to a jury trial make such a crucial difference? In both cases the decision maker was misinformed as to the law.

Isaac, Humphries, and Myers were all entitled to the decision makers being properly informed. Only Myers got a new trial. It appears that if Criminal Rule 30 is upheld under the circumstances, then Isaac and Humphries have been punished for exercising their constitutional right to a trial by jury. Such a distinction is arbitrary and capricious and cannot stand.

The same Fourth District Court of Appeals, who denied Isaac a new trial under Criminal Rule 30, held in State v. Sterling Burke, (Unreported), that his failure to object to the jury instructions that he had the burden to prove he was entitled to carry a firearm was plain error.

An affirmative defense is an affirmative defense, be it self-defense or lawfully carrying of a firearm. A failure to object is a failure to object. The jury was instructed that Isaac had to prove self-defense or that Burke had to prove he was entitled to carry the firearm. In both cases affirmative defenses were raised, and in both cases no objection to the jury instructions were made.

Burke's failure to object was plain error. Isaac's was not.

There is no reasonable justification for the difference in treatment of the defendants and therefore, Isaac has been denied equal protection of the law.

C. Requiring Proof of Self-Defense by Defendant Violates Due Process of Law.

> 6. DOES DUE PROCESS OF LAW FORBID A CONVICTION WHERE A JURY IS INSTRUCTED THE DEFENDANT HAS THE BURDEN TO PROVE SELF-DEFENSE WHEN THE HIGHEST COURT OF THE STATE DECLARES THAT THE DEFENDANT HAD NOT SUCH BURDEN?
>
> 7. IS IT A DENIAL OF DUE PROCESS OF LAW TO REQUIRE A DEFENDANT TO PROVE SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE?

Isaac's jury was told he had to prove self-defense by a preponderance of the evidence. Robinson found such a charge to be prejudicial error, and the State must disprove an affirmative defense once raised. Finally, the State modified Robinson and held that neither person had a burden. Even in light of the modification, Isaac was given a burden of proof where none existed.

The Respondents combined, for purposes of this petition with Isaac, raised below the issue as to whether or not a defendant can ever be required to prove an affirmative defense. Isaac did not specifically raise this issue. However, several members of the en banc panel raised and discussed this issue.

If this case is taken for review, Respondent Isaac is willing to brief and argue this point, but finds it difficult to explain how a decision could be rendered on such a point when it would be raised for the first time to the Supreme Court of the United States.

D. Due Process/Plain Error.

8. IS THE REFUSAL OF THE HIGHEST COURT OF THE STATE TO FIND "PLAIN ERROR" IN CASES PENDING ON REVIEW WHEN IT CHANGES THE LAW IN A CONSTITUTIONALLY PROTECTED AREA AND THEN DECLARES THE CHANGE TO BE RETROACTIVE A VIOLATION OF DUE PROCESS OF LAW?

I cannot think of anymore crucial part of a trial than the charge to the jury. Common sense dictates to state that you cannot have a fair trial without the jury being properly instructed as to the law.

When the Supreme Court of Ohio found that the change in the instruction as to burden of proof constituted prejudicial error, it tacitly admitted that Isaac did not have had a fair trial.

Once the State of Ohio admitted the improper instructions to the jury were prejudicial error, then Criminal Rule 52 provided as an escape valve. The Supreme Court of Ohio refused to allow it. In fact, careful research has revealed that the State of Ohio has never reversed a case upon the doctrine of plain error--whether or not the error was of constitutional dimensions. It is evident that Criminal Rule 52 is a sham or a ruse. Due process of law requires a Court, in some instances,

to recognize that an error is so prejudicial that retrial is necessary.

If a defendant's counsel failed to object at a trial to a law in existence, a defendant can receive a new trial based upon grounds of incompetency. If defendant's counsel does not object because the law was not yet in existence, but was later held to be retroactive then he cannot be held to be incompetent. In the first case, the defendant gets a new trial even though his counsel did not object and he should have. In the second case, the defendant does not get a new trial even though his counsel should not have objected. This does not make any sense, and it is arbitrary and capricious. In both cases the defendants were convicted under improper law.

CONCLUSION

This case should not be accepted for Certiorari, for if it is accepted for review, lower Courts may misread the decision as broadly as they have the past decision of Mullaney. Patterson has set this area of law to rest. Isaac is entitled to a new trial for any one of a number of complex, interrelated reasons. He now has his new trial. If the case is accepted for review, then all issues raised heretofore must be allowed to be argued and decided. All Courts previously have been careful not to reach the issues of complex constitutional dimensions.

Isaac believes that Wainwright v. Sykes has no application to bar federal review of whether or not a State has denied defendant his constitutional rights in the manner in which the State applies a retroactive change in the law.

Isaac believes once a principle is declared retroactive by either a federal or state court, then all defendants who raised that issue at trial below, and on the record, and can show the outcome of their case would be materially affected, are entitled to a new trial.

Isaac believes due process of law requires a jury be charged properly as to the law at the time of the trial. A retroactive decision makes the law different. A defendant is entitled to a new trial under the law as changed.

Isaac believes that defendants must be treated the same. If one fails to object to a jury instruction and gets a new trial, then so should all the defendant who failed to object to jury instructions be entitled to new trials.

Isaac believes that if error occurs in a trial that goes to the heart of the fact finding system, then he should be entitled to a new trial in which the mistake has been removed, regardless of any procedural bars.

The only thing that Isaac and petitioner agree on is that this case is complex. It reaches issues crucial to the fact finding process in a criminal case.

In summary, the danger of lower Court's reading unwarranted meaning into the case is great, unless all the following subtle issues are reviewed and disposed of:

As to the retroactivity question: When must a change in the law be declared retrospective? Are the principles of retroactivity the same for the Federal Courts and the State Court? If not, the Supreme Court of the United States declares a principle of law to be retroactive and then the State refuse or limit its application? Is the decision of a State to declare a principle of state law retroactive subject to federal review? Under what reasoning, if any, can a State deny the benefit of retroactivity to a defendant who, clearly, is affected by the change?

As to the question of equal protection: Is there a distinction between a jury and a Judge as the trier of facts that requires a misinformed Judge to rehear the case, but not the misinformed jury? Is the affirmative defense of self-defense so different from the affirmative defense of lawfully carrying a firearm that plain error lies in failure to object to proving the first, but not the second?

As to due process: Can a defendant even be required to prove self-defense as an affirmative defense? Can a State sustain a conviction

when it required a defendant to prove something, when, in fact, he had to prove nothing?

Finally, is the instruction to the jury so crucial to the fact finding process of a fair trial that any error in it that materially affected the outcome must be reviewed in spite of procedural bars?

Respectfully submitted,

James R. Kingsley

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that Respondent Isaac's Motion to Proceed in Forma Pauperis, Affidavit in Support, and Brief in Opposition to Certiorari, was served upon William J. Brown, Attorney General (Simon B. Karas, Counsel of Record) State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio, 43215; Mr. Richard L. Aynes, Counsel for Bell, University of Akron, School of Law, Appellate Review Office, Akron, Ohio, 44325; Mr. J. Dean Carro, Counsel for Hughes, University of Akron, School of Law, Appellate Review Office, Akron, Ohio, 44325, by regular U.S. mail from Circleville, Ohio, this _____ day of March, 1981.

James R. Kingsley

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

PICKAWAY COUNTY

FEB 1 1973

State of Ohio	:	No. 354
Plaintiff-Appellee	:	
vs	:	
Sterling M. Burke	:	O P I N I O N
Defendant-Appellant	:	

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SARA M. DRESHBACH
CLERK OF COURTS
PICKAWAY COUNTY

APPEARANCES

Jay H. Sanford, Columbus, Ohio, for Appellant.

Richard Gerhardt, Circleville, Ohio, for Appellee.

Stephenson, J.,

This is an appeal by Sterling M. Burke from a judgment of conviction and sentence imposed by the Pickaway County Common Pleas Court upon a jury verdict for the offense of carrying a concealed weapon, to-wit: a loaded .38 caliber Smith and Wesson firearm, in violation of R.C. 2923.12. The following errors are assigned:

"ASSIGNMENT OF ERROR NUMBER ONE

In a criminal case involving an affirmative defense under Section 2923.12(C) R.C., the defendant has only the burden of going forward with the evidence pertaining to such a defense and does not have the burden of establishing such affirmative defense by a preponderance of the evidence and, therefore, an instruction to the jury that the defendant must establish the affirmative defense by a preponderance of the evidence is error.

ASSIGNMENT OF ERROR NUMBER TWO

Where the accused in a criminal case is charged with carrying a concealed firearm, a third degree felony pursuant to Section 2923.12 R.C., the state must prove beyond a reasonable doubt that the alleged firearm is capable of inflicting death and capable of expelling or propelling

> one or more projectiles by the action of an explosive or combustible propellant in order for the evidence to support a finding of guilty."

The facts in this case are relatively simple and, in summary, are the following. Appellant was observed in Circleville, Ohio, on June 30, 1975 by the municipal chief of police. When observed, a bulge was observed under appellant's coat which the police chief believed to be a gun. Upon further observation by the chief, appellant's carrying of a weapon was confirmed when the coat gapped open. Appellant was arrested and subsequently indicted. At trial, appellant defended upon the basis of the affirmative defenses set forth in R.C. 2923.12(C)(1) & (2).[1] His evidence in support of those defenses was essentially that he was a field representative for Local 423 of the Laborers International Union of North America and his duties included collecting initiation fees and dues at various job sites. On the date of arrest appellant testified he had collected and had on his person approximately three to five hundred dollars. He further testified he carried the weapon for his protection because of the large sums of Union money he normally had on his person. The evidence further disclosed appellant had been appointed a deputy sheriff of Ashtabula Count and had posted bond for carrying a concealed weapon. He was not, however, on duty at the time and place of the offense.

The trial court instructed the jury, without objection, that the burden was upon appellant to prove his affirmative defense or defenses by a preponderance of the evidence. The court further instructed that "if the weight of the evidence is equally balanced or if you are unable to determine which side of the issue has the preponderance, then the defendant has not established such issues."

The placing of the burden of the affirmative defense upon

appellant was error under State v Robinson, 47 Ohio St. 2d 103, which was announced subsequent to appellant's trial, although such was the long established common law rule and followed in Ohio. The Supreme Court therein held the General Assembly intended in enacting R.C. 2901.05(A), effective January 1, 1974, that by the sentence "The burden of going forward with the evidence of an affirmative defense is upon the accused", the General Assembly intended to negate the common law rule and require that defendant have only the duty to go forward with sufficient evidence to raise the defense.

In Robinson, however, and unlike here, a timely objection was interposed to the instruction in such respect. Crim.R.30 provides in part:

> "A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. Amended July 1, 1975."

The Ohio courts generally apply a waiver rule by refusing to consider any error which counsel for a party complaining of a trial court's judgment could have called, but did not, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. State v Maupin, 42 Ohio St. 2d 473; State v Gordon 28 Ohio St. 2d 45; State v Lancaster, 25 Ohio St. 83; State v Glaros, 170 Ohio St. 471. In State v Humphries, 51 Ohio St. 2d 95, decided July 20, 1977, the court reaffirmed it's adherence to the waiver rule. In Humphries, although the trial had been held prior to the announcement of the Robinson decision, the Court of Appeals applied Crim. R. 30 and the Supreme Court affirmed upon that basis.[2]

Crim. R.52(B), however, does authorize a court to notice

plain error which affects substantial rights in the court's jury instructions even though it was not brought to the attention of the court pursuant to Crim. R.30. 8A Moore's Federal Practice 30-15, Sec. 30.04. Crim. R. 52(B) is a verbatim adoption from the Federal Rules of Criminal Procedure. Crim. R. 52(B) in providing that "plai error" or "defects affecting substantial rights may be noticed", obviously does not define the meaning of such terms.

It has been stated with respect to the federal rule that "in reviewing a trial for plain error, the touchstone is fundamental fairness." U.S. v Garcia, 528 F. 2d 580 (1976). The Ohio State Supreme Court has stated in State v Wolery, 46 Ohio St. 2d 316 (1976 with respect to Crim. R. 52(B) that "The rule's purpose is to safeguard the right of a defendant to a fair trial, notwithstanding his failure to object in timely fashion to error at that trial. However "the plain error rule was intended to be and should be applied to serve rather than subvert the ends of justice. The rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice." Eaton v United States (C.A. 5, 1968), 398 F. 2d 485, 486.

Additionally, the Ohio Supreme Court has stated, with respect to the Civ. R. 51(A) which requires objections to jury instructions and the concept of fundamental error, that "Exceptions are granted only in circumstances where the error has seriously affected the basic fairness, integrity, or public reputation of the judicial process." Whatever the precise perimeters of the standard may be in application, it is self evident that the instruction must be considered in the light of the evidence, the elements to be prove of the offense charged and the defenses tendered.

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Under the evidence in this case, there existed no factual dispute that appellant carried a weapon concealed upon his person. Nor, for that matter, was it disputed factually that appellant, in the course of his duties, carried large sums of money which he collected from union members at job sites. Thus, whether appellant carried the weapon because, as he claimed, of the large sums of money he collected, the jury clearly was presented with a close question of whether the statutory affirmative defense required acquittal. While it was the jury's perrogative to believe or disbelieve appellant, facially in the record there was no apparent reason for disbelieving him.[3]

Under such circumstances, the erroneous placing of the burden of proof as to the defense upon appellant may well have caused the jury to decide the case upon the further instruction, "if the weight of the evidence is equally balanced or if you are unable to determine which side of the issue has the preponderance, then the defendant has not established such issues." In short, we are in doubt if the same verdict would have been returned had the burden of proof of the defense been properly placed.

Since Crim. R. 52(B) involves the exercise of discretion and necessitates a case by case analysis of the impact of any error, and we have in a number of past appeals held it inapplicable, we are persuaded the erroneous instructions here constituted plain error within the meaning of Crim. R. 52(B), even though Crim. R. 30 was not complied with. The first assignment of error is sustained.[4]

The second assignment of error is overruled. Appellant asserts that even though the firearm was introduced into evidence, together with evidence it was loaded at the time of the offense, and

the jury instructed it must find the weapon was operable or could be readily rendered operable, the evidence was insufficient without additional affirmative evidence as to it's operability. We disagree. Absent any claim or proof at trial of inoperability, the evidence was sufficient for the jury to find against appellant as to such necessary element. The weapon was an exhibit and was subject to examination by the jury. See State v Adkins, 40 Ohio App. 2d 473.

For the reasons above state, the judgment below is reversed and vacated and the case remanded for a new trial.

JUDGMENT REVERSED

Abele, P.J. and Grey, J., CONCUR:

1

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply;
(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in or was going to or from his lawful business or occupation, which business or occupatio was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent man in going armed.
(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while he was engaged in a lawful activity, and had reasonable cause to fear a criminal attack upon himself or a member of his family, or upon his home, such as would justify a prudent man in going armed.

2

The opinion of the Supreme Court in Humphries states in part: "In the Humphries case, the Court of Appeals held, as an additional reason for affirming the judgment of the trial court, that the defense, in failing to object to error in the jury instructions as required under Crim. R. 30, waived any objection to such error on appeal. The defense raised no objection to the application of

(Footnotes cont.)

[2] Crim. R. 30 in its submitted brief to this court, and we find no misapplication of the rule or abuse of discretion on the part of the Court of Appeals in applying the rule to this cause." Inasmuch as Crim. R. 30 places a mandatory duty of objecting to jury instructions as a predicate to assert error on appeal, conceiveably the statement "we find no. . . . abuse of discretion in applying the rule to this cause", reflects a sub silento determination that the discretionary Crim. R. 52(B) "plain error" provision was inapplicable under the factual pattern of the case.

[3] Indicative of the importance of the improper placing of the burden of proof as to the affirmative defense is the disclosure in the record that after deliberations commenced, the jury requested to be re-instructed as to the affirmative defenses and they, for the second time, were informed the burden was upon the defendant.

[4] In fairness to the trial court, it should be noted that this case was tried prior to the Robinson decision. Since announcement of the Robinson decision, error in placing the burden of proof upon the defendant as to affirmative defenses has been frequently assigned. In reviewing these appeals we have found no trial court which instructed the jury otherwise than did the trial court herein prior to the Robinson decision.

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No. 80-1430

E. P. PERINI, Supt.,)
Petitioner,)
-vs- :
KENNETH L. BELL,)
Respondent.)

RESPONDENT BELL'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Pursuant to Rule 46 of the Rules of this Court, motion is hereby made that Respondent Bell be allowed to proceed *in forma pauperis* for the reasons stated in the attached affidavit. Petitioner has proceeded *in forma pauperis* in the proceedings below both in the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD L. AYNES
Counsel for Respondent Bell

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Certificate of Service

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that a copy of the foregoing Motion and attached Affidavit was sent by first class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113 on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P.O. Box 57, Marion, Ohio, 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
Counsel for Respondent Bell

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.: 80-1430

E. P. PERINI,)
Petitioner)
-vs- : AFFIDAVIT OF INDIGENCY
KENNETH L. BELL,)
Respondent.)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, KENNETH L. BELL, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? NO

   A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   B. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   7-74 - $125.00 PER WEEK

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

A. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

no

A. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no

6. I previously proceeded *in forma pauperis* in both the Federal District Court at the U. S. Court of Appeals below.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Kenneth L. Bell

KENNETH L. BELL

STATE OF OHIO)
) ss:
COUNTY OF)

Duly witnessed and sworn before me, a Notary Public, this 16th day of March, 1981.

Wilbur N. Judy

NOTARY PUBLIC
WILBUR N. JUDY, Notary Public
In Marion County, Ohio
My Commission Expires June 1, 1981

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing affidavit on Petition for Writ of Certiorari to counsel for the Petitioner Simon B. Karas, Assistant Attorney General, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this _____ day of _____, 1981. The address for Petitioner Perini is: P.O. Box 57, Marion, Ohio 43302.

RICHARD L. AYNES
Counsel for Petitioner

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

NO.: 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

E. P. PERINI, Superintendent,

Petitioner,

-vs-

KENNETH L. BELL,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

AFFIDAVIT OF FILING

Richard L. Aynes, being first duly sworn, deposes and says:

1. I am a member of the bar of this Court and otherwise competent to execute this affidavit under Rule 28.2 of this Court;

2. On the 25th day of March, 1981, I caused to be sent by first class, prepaid United States Mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C., 20543, the original and nine (9) copies of Respondent's Brief Opposing the Petition for Writ of Certiorari in the above-captioned matter and the original and nine (9) copies of the Motion for Leave to Proceed

In Forma Pauperis. This mailing was made within the time permitted by this Court for such a filing and was made by employees of the University of Akron in the manner stated above.

3. Further, affiant sayeth naught.

RICHARD L. AYNES
Counsel for Respondent

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Sworn to and subscribed before me this 25th day of March, 1981.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that a copy of the foregoing Affidavit was sent by first class mail to Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad St., Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
COUNSEL FOR RESPONDENT BELL

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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

E. P. Perini, Petitioner

-vs-

Kenneth L. Bell, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT BELL OPPOSING THE PETITION FOR CERTIORARI

RICHARD L. AYNES

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent Bell

Best Copy Available

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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

E. P. Perini, Petitioner

-vs-

Kenneth L. Bell, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT BELL OPPOSING THE PETITION FOR CERTIORARI

I.

Preliminary Statement

KENNETH L. BELL, by and through his undersigned counsel files this Brief in Opposition to the Petition for Writ of Certiorari in order to demonstrate that the instant case is an inappropriate one for the granting of review. Though Petitioners Engle and Perini exercised their option to file one consolidated Petition for Certiorari from the three separate judgments below, each of the three Respondents have elected to file separate briefs opposing that Petition.

It should be noted that since the filing of the Petition for Certiorari, the opinion of the Sixth Circuit below has been officially reported: *Bell v. Perini*, 635 F. 2d 575 (6th Cir., 1980). Further, one of the cases relied upon by Petitioner has also been published: *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980).

II.

Statement of the Case

Respondent Bell accepts, for the limited purposes of these Certiorari proceedings, the Statement of the Case entitled "*Bell*" that appears on page five of the Certiorari Petition. At the same time, he specifically disputes what he believes to be Petitioner's misapprehension with respect to both the status of the law in the state of Ohio and the decision of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit. *See* Certiorari Petition at 3 and 4, under the heading of "*Isaac.*" However, since these points of disagreement are relevant to the consideration of whether Certiorari shall be granted or denied, Mr. Bell will treat that dispute in his argument below.

III.

Argument Opposing Certiorari

A.

PETITIONERS MISAPPREHEND THE NATURE OF THE DECISION OF THE SIXTH CIRCUIT BELOW.

In attempting to persuade this Court that the decision below raises issues which are deserving of review, Petitioner Perini emphasizes that the majority of the panel below consisted of a combination of a four member plurality and two separate concurring opinions, while there were also four dissenters. By ignoring the issues that were actually before the Court in *Isaac* and the points of agreement within the various opinions, Mr. Perini attempts to paint a picture of a badly "fragmented" court which cannot muster a clear majority upon any rationale sufficient to support its judgment.

But in assessing the significance of the multiple opinions, it is important to place them in their proper context by considering the issues that were before the U. S. Court of Appeals in *Isaac*. A careful reading of the *en banc* decision makes it

clear that the Court in that case had to resolve three separate issues:

1. Was it error to place the burden of proof upon the issue of self defense on the accused?
2. If so, was that error of constitutional magnitude?
3. If so, was the Petitioner precluded from asserting the constitutional violation in Habeas Corpus because of the waiver concept enunciated in *Wainwright v. Sykes?*

As best as counsel for Mr. Bell can determine, no member of the Court below denied that the state had erred in making Mr. Isaac (and Mr. Bell) prove his innocence by establishing that he had acted in self-defense. The error in such an instruction is demonstrated by reference to R.C. 2901.05(A) (eff. 1/1/74) which read, in relevant part:

> ". . . the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."

Since the State Supreme Court clearly indicated that this statute applied to every trial after January 1, 1974, *e.g., State v. Humphries,* 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977), there can be no doubt that the statute was applicable to Mr. Bell's trial. For this reason, the Court appears to have been unanimous upon the resolution of this issue in Mr. Isaac (and Mr. Bell's) favor.

With respect to the second question, all four Judges of the plurality, both of the concurring Judges, and Judge Merritt (dissenting on other grounds) found that the misallocation of the burden of proof upon the only disputed issue in the trial was error of constitutional magnitude. The three dissenting Judges took the opposite approach under the novel theory that under state law neither the state nor the accused bore any burden of proof upon the issue of self-defense. In effect, such a holding

would mean that self-defense was irrelevant to any homicide.[1/] But without respect to whether, as Mr. Bell feels, the majority was correct, or as argued by Mr. Perini, the dissenters were correct, the significant fact is that rather than being "fragmented" there was a clear seven to three majority upon this question.

On the third question, the *en banc* panel split was 6 to 4, with a firm majority holding that when the standards articulated by *Wainwright v. Sykes*, 433 U.S. 72 (1977) were applied to the facts of *Isaac* (and the case at bar) it was proper to reach the merits of the constitutional claim.

It is, of course, true that as quoted at page seven of the Certiorari Petition, Chief Judge Edwards indicated that the *Isaac* case produced much "soul-searching thought and debate . . ." (*See* also Petition, A-10.) But an examination of the various opinions of the Court suggests that it was not the *Wainwright* cause and prejudice standard--upon which Petitioner Perini predicates his argument for Certiorari--which produced this result.

[1/] Judge Lively (dissenting), writing for himself and Judges Engle and Kennedy, attempts to treat self-defense as a matter of "confession and avoidance." His argument is premised upon the view that: "The jury does not reach a defense of self-defense until it finds that all elements of an offense have been established beyond a reasonable doubt." (*Isaac*, Slip Op. at 19, Certiorari Petition at A-18.)

This interpretation of State law, unsupported by any citation of authority, is directly contradicted by decisions of the Ohio Supreme Court:

> "Once the affirmative defense of self-defense has been properly raised, the trier of fact must consider it and all the evidence in the case and if, after so doing, the trier of fact entertains a reasonable doubt of the defendant's guilt he must be acquitted." *State v. Abner*, 55 Ohio St. 2d 251, 254, 379 N.E. 2d 228 (1978) (emphasis added).

> ". . . the trier of fact must consider all the evidence in the case, including all the evidence as to the affirmative defense, and if the trier of fact entertains a reasonable doubt of defendant's guilt, the defendant must be acquitted . . ." *State v. Chase*, 55 Ohio St. 2d 237, 278 N.E. 2d 1069 (1978) (Syllabus 2) (emphasis added).

To the contrary, it appears that a significant portion of the plurality opinion, both of the concurring opinions, and Judge Merritt's dissenting opinion were all the product of another concern: whether it was possible for the State to constitutionally place the burden of proof on the issue of self-defense upon the accused.

This issue was injected by the plurality opinion's proffered view that even though in this case the state of Ohio had chosen not to place the burden of proof upon the accused, it was free to do so. It was this expression of opinion that prompted responses by Chief Judge Edwards, Judge Jones and Judge Merritt (dissenting on other grounds). Though that disagreement may have been intense, an examination of the record will demonstrate that both the plurality's view and the response by the other Judges was *dicta*.[2/] The broader question of whether the State of Ohio could constitutionally place the burden of proof upon the accused was neither raised nor briefed by any of the parties or *amici* in the Court of Appeals below.[3/]

Mr. Bell does not deny that the constitutional issue of whether the State may constitutionally require him to prove his innocence by proving that he acted in lawful self defense is an important one which was reserved in *Hankerson v. North Carolina*,

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[2/] Judge Jones, in his concurring opinion, specifically noted that:

> ". . . the lengthy discussion of Parts V and VI of the plurality opinion is dicta." *Isaac*, Slip Op. at 4, n. 2; Petition at A-12, n. 2.

[3/] This issue was raised by both Respondent Bell and Hughes below. However, because their decisions were controlled by the narrower *Isaac* rationale, the panels in those cases did not address the broader constitutional issue.

432 U.S. 233 (1977). However, given the fact that the discussion of this issue in the *Isaac* case was *dicta*; that such expression was obtained without the normal adversary process of briefing and arguing the issue; and that *Isaac* presents a narrower grounds for deciding the instant case, Mr. Bell respectfully submits that the present case is not the most appropriate one for resolving that weighty issue. Indeed, once final decision is rendered, it would appear that the case relied upon by the Petitioner, *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980) (Petition for rehearing pending) would be a proper vehicle for the resolution of that question.

The point to be made here is that, contrary to the view presented by Petitioner Perini, the Court below was not "fragmented" upon the important issues of the case. Rather, the voting upon each of the issues demonstrates unanimity upon the first question presented, a seven to three split upon the second, and a six to four split upon the third. Further, it was not the "waiver" issue upon which the Petitioner seeks Certiorari which caused so much disagreement in the Court below, but rather the wider constitutional issue with respect to the constitutionality of requiring the accused to prove his innocence by proving self-defense. While that issue is an important one deserving the granting of Certiorari, it is not the basis for the Petition in this case and, as set forth above, this case would not be the best vehicle for resolving that question.

B.

THE CONFUSION CREATED BY THE STATE OF OHIO THROUGH ITS LEGISLATURE AND COURTS MAKES THIS CASE ONE INAPPROPRIATE FOR CERTIORARI.

Any assessment of the gravity of the error in the trial court in making the accused prove his innocence (by proving self defense) or of whether reasons exist to bring such cases within

the cause and prejudice rule of *Wainwright v. Sykes, supra,* must necessarily begin with an analysis of what Chief Judge Edwards characterized as ". . . Ohio's tangled laws pertaining to self-defense . . ." (*Isaac,* Slip Op. at 12; Petitioner's Appendix at A-11) (emphasis added). Though the Petitioners make a yeoman-like effort to make Ohio law upon self-defense appear to fit some reasoned, consistent pattern, the inconsistent action of both the State Legislature and the Ohio Courts doomed that effort to failure.

The complexity caused by the inconsistent actions of the State of Ohio is demonstrated not only by the fact that the dissenters below unwittingly adopted an interpretation of Ohio law that is directly contradicted by two Ohio Supreme Court decisions, *supra* at 4, note 1, but also by the fact that much of the debate between the Judges of the Circuit Court below focused upon which of the inconsistent Ohio actions should be considered authoritative. Because Mr. Bell believes that this type of confusion--which arises not out of the normal course of litigation, but rather from the contradictory acts of the State itself--makes the present case particularly unsuited for Certiorari review, he deems it appropriate to set forth in some detail the actions of the State which produced this result.

Prior to January, 1974, case law interpretation placed the burden of proof on self-defense upon the accused. This action was not based upon the view that self-defense bore no relationship to guilt or innocence. To the contrary, Ohio case law specifically recognized that proof of self-defense was proof of innocence. But the placement of the burden of proof on this issue upon the accused was justified by use of a presumption: that all killings were presumed to be unlawful and that proof of self-defense negated that presumption. *E.g., State v. Silvus,*

22 Ohio St. 90 (1871); *State v. Weaver*, 24 Ohio St. 584 (1874).[4/]

Though use of such presumptions were shown to be unconstitutional, *e.g.*, *Leary v. United States*, 395 U.S. 6 (1969), *In re Winship*, 397 U.S. 358 (1969), the Ohio courts continued to apply the same rule for several years without inquiring into its constitutional underpinnings. *E.g.*, *State v. Seliskar*, 35 Ohio St. 2d 95, 298 N.E. 2d 582 (1973), *State v. Rogers*, 43 Ohio St. 2d 128, 330 N.E. 2d 674 (1975), *cert. den.* 423 U.S. 1061 (1976). This is particularly noteworthy in view of Ohio Revised Code Section 2945.11 which places a special and independent duty upon the trial Judge to charge the jury properly:

> "In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict . . . ." (Emphasis added) (Pages, 1975 Replacement Volume).

In 1974 the State Legislature enacted a comprehensive revision of the State Criminal Code. Among the matters added to the new code was Section 2901.05(A) (eff. 1/1/74) which provided in relevant part:

> ". . . the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."

Though this statutory revision of Ohio law upon the burden of proof would appear to be salutory, at least to the extent that

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[4/] *Id.* at 590:

> "The shooting with intent to kill being established, the law implies malice; and the malice thus implied, can only be rebutted by showing circumstances of justification or excuse."

it abandoned reliance upon the unconstitutional presumption, the Legislature's action created confusion upon two separate counts.

First, by definition, an affirmative defense is one in which the burden of proof is placed upon the defendant. The term "affirmative defense" has no separate content or meaning rather than to distinguish it from a normal "defense" (such as alibi, or mistake as to identity) where the state still bears the burden of proof. Thus, to use terms in the statute which suggest that something is an "affirmative defense" and yet to not require the defendant to bear the burden of proof upon that issue is not only contradictory but confusing.[5/]

Second, in spite of the significant change this worked in Ohio law, the Legislature and the commentators apparently failed to take note of the effect of the new law. As documented by Judge Peck's Opinion in the original panel Decision in *Isaac*, the change was not noted in: the Committee notes accompanying the new statute; the Ohio Jury Instructions; or the leading treatises. (*Isaac* Panel Decision at 7, Petition for Writ of Certiorari at A-29.) Nor was mention made of such a change in the leading law review article treating the legislative history of the criminal code revision, even though that article was authored by two of the co-sponsors of the bill. Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974).

In its first look at the new statute, the Ohio Supreme Court stated directly that with respect to affirmative defenses the statute required the accused "to prove that issue by a preponderance of the evidence." *State v. Rogers*, 43 Ohio St. 2d 28, 33, 330 N.E. 2d 674 (1975) *cert. den.* 423 U.S. 1061 (1976). But

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[5/] It would seem that the Legislature actually meant to indicate that the defendants would bear the burden of persuasion on those defenses which had traditionally (or heretofore under Ohio law) been identified as affirmative defenses.

one year later the same Court, in *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) correctly interpreted the statute to have changed the common law in Ohio on the burden of proof with respect to affirmative defenses. In so holding the majority failed to acknowledge its prior decision in *Rogers* even though that decision was cited by the sole dissenting Judge. *Robinson*, 47 Ohio St. 2d at 118. Moreover, the Court indicated that since the terms used in the statute had a "well-recognized meaning," there could be "no substantial doubt" as to its interpretation, which, in the view of the Court, was "obvious." *Robinson*, 47 Ohio St. 2d at 110.

The following year the State Supreme Court rendered its opinion in *State v. Humphries*, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977). In that decision the Court ignored the independent duty of the trial court to give the jury proper instructions upon the law, *see* R.C. 2945.11, and held that trial counsel's failure to object would preclude correction of the error in making the accused prove what had been traditionally termed as an affirmative defense.

In taking this approach, the Court set a higher standard of legal scholarship for the practicing bar than the Ohio Courts exercised when acting in their own official capacity. In effect, the Court faulted trial counsel, and made clients suffer for that fault, when trial counsel did nothing more than make the very same mistake that the State Supreme Court had made in *Rogers*.

Finally, in subsequent decisions the Ohio Supreme Court admitted, as it must, that self-defense was relevant to guilt or innocence in that it might raise a reasonable doubt as to the guilt of the accused.[6/] The logical corollary is

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[6/] *See supra*, 4, note 1.

that where self-defense has been properly placed in issue guilt can be established only where the State has proved, beyond a reasonable doubt, that the accused did not act in self-defense. Yet, the Ohio Supreme Court held that it was not error to fail to instruct the jury that the State must establish that the accused did not act in self-defense. *State v. Abner*, 55 Ohio St. 2d 251, 379 N.E. 2d 228 (1978) and *State v. Chase*, 55 Ohio St. 2d 237, 378 N.E. 2d 1064 (1978). In effect, the State Court held that though self-defense is relevant to guilt or innocence, the jury should not be told of that relationship. Rather, the jury is to be told the State must prove all the elements of the crime beyond a reasonable doubt; that there are certain factors which constitute self-defense; left to speculate as to the relationship, if any, between the State's burden to prove guilt and self-defense; and left to speculate as to who has the burden of proof upon self-defense.

An examination of these conflicting actions and decisions is required to determine both the constitutional significance of the error in the trial below and whether the counsel's failure to object comes within the cause and prejudice standard. This type of complexity, which arises not from the course of normal legal proceedings, but rather from the inconsistency of the action of official bodies of the State of Ohio, renders this case particularly unsuited for review by the highest Court in the land.

C.

THE EXTREMELY LIMITED PRECEDENTIAL EFFECT OF THE DECISION BELOW AND, CONSEQUENTLY, OF ANY DECISION RENDERED BY THIS COURT UPON THESE CASES, MAKES IT AN INAPPROPRIATE VEHICLE TO FURTHER DEFINE THE CAUSE AND PREJUDICE STANDARD ADVANCED IN *WAINWRIGHT*.

Petitioners Engle and Perini attempt to frame their issue in terms of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and

argue that the decision of the Sixth Circuit below is in conflict with *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980). But an examination of the *Cole* case indicates that that case is distinguishable from the case at bar in a number of instances. Two noteworthy factors are as follows. First. The benefits under *Henkerson* that were claimed in *Cole* derived directly from this Court's prior pronouncements on the constitutional requirement of proving guilt beyond a reasonable doubt and was not tainted by any inconsistent or contradictory actions as the State of Ohio, through its Legislature and courts, injected in the case at bar. Second. To the extent that it can be argued that there was any "confusion" on the meaning of the federal constitutional standard, the State in *Cole* might be able to claim that it was not responsible for that misunderstanding. But in the case at bar, it was the State itself which caused the confusion and no claim can be made that it relied upon the decisions or interpretations of the federal courts in finding the meaning of its state statute.1/

Even if it were assumed, *arguendo*, that there was a conflict between *Cole* and the instant case, that would not necessarrily indicate that Certiorari is warranted. *E.g.*, *Warme v. United States*, 435 U.S. 1011 (1978) (Certiorari denied) (Justice White and Justice Rehnquist dissenting, indicating that on the standard of ineffective assistance of counsel there was a three-way conflict among the circuits, as well as an internal split in the Ninth Circuit). Among other matters to be considered is the precedential effect of both the decision below and of any decision that would be potentially rendered by this Court.

1/ Indeed, in *State v. Robinson*, *supra*, the State Supreme Court specifically indicated that its decision was based upon state law and stated that consequently "we need not consider whether *Mullaney* might constitutionally mandate a similar result." 47 Ohio St. 2d at 113-114, n. 11.

Any decision must be considered within the context of its own facts. The broader and more familiar the factual pattern, the greater the principles of law that can be articulated and the more important is the case for purposes of determining whether Certiorari is warranted. By the same token, the more unique the factual and legal basis of the case, the less precedential value it will have.

In this context, it is important to emphasize the limited application of the *Isaac, Bell and Hughes* decisions, even in *Wainwright* situations.

First. The decision of the Court below, because it is based upon the unique circumstances of Ohio law, has no general precedential value in any other jurisdiction, including the other states within the Sixth Circuit. Ohio's situation is *sui generis*.

Second. Even as to Ohio, the case only applies to criminal cases and then only to those cases which were tried between January 1, 1974 and November 1, 1978.

Third. Even as to that narrow category of cases, the decision would not affect all criminal cases, but only those in which matters which were traditionally called affirmative defenses were raised. But the holding is even more limited since it would not affect:

(a) Those cases where the accused was acquitted in spite of having to bear the burden of proof;

(b) Those cases in which the State courts have ruled that it was error to give any instruction of the affirmative defense and hence any error in such instruction was harmless beyond a reasonable doubt; and

(c) Those who have received a final release from the State of Ohio and have filed no Habeas Corpus Petition cannot now do so because of the "in custody" requirement of the habeas statute.

Fourth. Even as to the cases pending which have issues similar to *Isaac*--which Petitioners estimate to be approximately twenty-five--it is possible that many of these cases are not, to use Petitioners' words, "live" cases. For example, of the three cases actually decided by the Sixth Circuit, two of those three, Mr. Isaac and Mr. Hughes, have already received final releases. Similarly, of the cases pending in the Sixth Circuit, it appears that at least one may now be moot because of the death of the Petitioner-Appellant. (*See* Petitioner-Appellant's [Abner] Response to Motion to Stay Issuance of Decision, attached as A-1.) By the same token, Mr. Bell's counsel is also counsel for Mr. Donald Robinson who, though he has obtained a final release through parole from the State of Ohio, was the beneficiary of a favorable decision based on *Isaac* on which an appeal is presently pending in the Sixth Circuit in Case No. 81-3144. How representative such cases may be of the other cases pending with *Isaac*-type issues, is not known to Mr. Bell's counsel. But the point is that even considering the cases pending, the actual effect of the *Isaac, Bell* and *Hughes* decision is very limited.

Because of the limited precedential nature of the decision below, Mr. Bell submits that the case at bar does not justify the expenditure of time and resources by this Court on a matter that has already received *en banc* consideration by the Circuit Court.

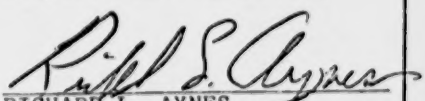
IV.

CONCLUSION

Mr. Bell has attempted to demonstrate to the Court that because of a variety of circumstances, most of which are caused by the State of Ohio through its courts or Legislature, this case is not one which should properly be used as a vehicle to expound upon important principles of constitutional law.

Indeed, with respect to the *Wainwright v. Sykes* issue this Court has already given general guidance to the lower courts upon the proper application of these principles. Petitioner Perini has not pointed to any matter which would call upon this Court to offer further refinements of the standards articulated in *Wainwright*. But even if such circumstances did exist, the limited precedential nature of the case below along with the confusion caused by the State of Ohio by its conflicting interpretations on the law of self-defense, make this case a particularly inappropriate vehicle for further development of *Wainwright* principles.

Respectfully submitted,



RICHARD L. AYNES
Counsel for Respondent Bell

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that a copy of the foregoing Brief in Opposition was sent by first class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and Richard David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this 25th day of March, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

Richard S Aynes

RICHARD L. AYNES
Counsel for Respondent Bell

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEO ADNER

Petitioner-Appellant

v.

DAVID R. McKEEN

Respondent-Appellee

No. 79-3329

PETITIONER-APPELLANT'S
RESPONSE TO MOTION TO STAY ISSUANCE OF
DECISION

Attorneys for Petitioner Appellant respectfully inform this Court that they would have no objection to a stay of issuance of decision in the above style case for reasons set forth in the accompanying memorandum.

MEMORANDUM

Petitioner-Appellant has been released on medical furlough due to serious illness and his attorneys have recently received hearsay information to the effect that he is deceased. Petitioner-Appellant's attorneys are attempting to verify this information and will apprise the Court as soon as Petitioner-Appellant's status is determined.

Respectfully submitted,

JULIA K. CASEY
SHELDON M. SLAYBOD

CERTIFICATION

This is to certify that a copy of the foregoing Response was mailed by ordinary U.S. mail this ____ day of _____, 1981 to Simon B. Karas, Assistant Attorney General, Division of Criminal Activities, State Office Tower, 30 East Broad St., Columbus, OH 43215.

Office-Supreme Court, U.S.
FILED
MAR 28 1981
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CLERK

Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HUGHES OPPOSING THE PETITION FOR CERTIORARI

RICHARD L. AYNES

Appellate Review Office
School of Law
University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent Hughes

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Case No. 80-1430

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BRIEF OF RESPONDENT HUGHES OPPOSING THE PETITION FOR CERTIORARI

I.

Preliminary Statement

HOWARD HUGHES, by and through his undersigned counsel, filed this Brief in opposition in order to demonstrate that the instant case is an inappropriate one for the granting of Certiorari. Though Petitioners Engle and Perini exercised their option to file one

consolidated Petition for Certiorari from the three separate judgments below, each of the three Respondents have elected to file separate briefs opposing that Petition. Nevertheless, in an attempt to avoid redundancy and to further the interest of judicial economy, Respondent Hughes will attempt to limit his argument to those matters that may be of particular importance to his own case and, on questions of more general applicability, rely upon the legal analysis set forth in the Brief filed by Respondent Bell.

As a matter of convenience, it should be noted that since the filing of the Petition for Certiorari, two of the relevant cases cited by Petitioner have been officially reported: *Bell v. Perini*, 635 F. 2d 575 (6th Cir., 1980) and *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980).

II.

Statement of the Case

Respondent Hughes accepts, for the limited purposes of these Certiorari proceedings, the Statement of the Case entitled *"Hughes"* that appears on pages five through six of the Certiorari Petition. At the same time, to the extent that Petitioner's representations with respect to both Ohio law and the decision of the Sixth Circuit which appear under the heading *"Isaac"* (Certiorari Petition at 3 through 4) are relevant to the instant case, Mr. Hughes specifically contests what he believes to be a misapprehension with respect to both the status of the law in the state of Ohio and the decision of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit rendered in *Isaac* on December 12, 1980. To the extent that the interpretations of these legal questions may be relevant, Mr. Hughes joins in and concurs fully with the analysis of

Ohio law and the analysis of the opinion of the Sixth Circuit set forth fully in the Brief in Opposition submitted to this Court by Respondent Bell.

III.

Argument Opposing Certiorari

A.

THE FACT THAT MR. HUGHES HAS RECEIVED A FINAL RELEASE FROM THE STATE OF OHIO DEMONSTRATES THAT THIS IS NOT A PROPER CASE FOR CERTIORARI.

Petitioner Engle points out in page 6 of his Petition for Certiorari that Mr. Hughes, like Mr. Isaac, has received a final release (termination) of his parole from the state of Ohio. This means, that as far as the state of Ohio is concerned, he has fully served his entire sentence.

This fact calls into question the propriety of allowing Superintendent Engle to continue to pursue this litigation. To be sure, there are collateral consequences that

attach to a felony conviction and Mr. Hughes has a vital interest in seeking to maintain intact the favorable decision that he received from the United States Court of Appeals below.

But what is the interest of Respondent Engle in this proceeding? Counsel for Petitioner Engle has proffered as an interest "the collateral consequences of reversed conviction" (Petition at 6). However, it is important to note who the parties actually are in this proceeding. Unlike a criminal case which may come to this Court directly from the State Supreme Court, the state of Ohio is not named as a party. Rather, Mr. Engle was named as the party defendant here. He was named as such, not as a representative of the state of Ohio, but by virtue of the fact that he was the individual who held custody of Mr. Hughes when the Habeas Corpus Petition was filed. The reason for naming him as a party and his sole interest in this proceeding stems from his status as custodian.

Normally if he, as custodian, prevails, then he is allowed to continue to maintain custody of the prisoner. If he loses in the Habeas proceedings, then he is compelled to release the prisoner. If a prisoner gains release after a favorable decision on appeal and this Court should reverse the decision of the appellate court, then the custodian would have the right to reassert custody over the individual. In the case at bar Mr. Engle admits that he has no claim of custody over Mr. Hughes. If Mr. Engle prevails, Mr. Hughes still remains free with a final release. If Mr. Hughes prevails, obviously the same result attaches. Thus, if this Court were to grant Certiorari, no matter what the outcome, there would be no "remedy" which would in any way change Mr. Engle's position. While the collateral consequences of a conviction or lack of conviction would certainly affect Mr. Hughes and would arguably affect the interest

of the state of Ohio, it has no effect upon Mr. Engle's standing as the Superintendent to claim the right to maintain custody.

Counsel for the Petitioner seems to admit as much when he refers to Mr. Bell's case, who is still in custody, as a "live" case and, at least by implication, acknowledges that neither Mr. Isaac's nor Mr. Hughes' case presents a "live" case (Petition at 6). Under these circumstances, Mr. Hughes would submit that Superintendent Engle's interest in this case is, at best, only an abstract concern with the academic question in which he has no greater interest than any other citizen in the state of Ohio. It is therefore submitted that the case is not one appropriate for the granting of Certiorari.

B.

ISSUES CONSIDERED BY THE COURT OF APPEALS BELOW.

In attempting to persuade this Court that the decision below raises issues which

are deserving of the attention of this Court Petitioner Engle emphasizes that the majority of the panel below consisted of a combination of a plurality and two separate concurring opinions, while there were also four dissenters. Further, Petitioner quotes from the separate concurring opinion of Chief Judge Edwards to the effect that the *Isaac* opinion caused much "soul-searching thought and debate." (Petition at 7.)

But in assessing the significance of these facts, it is important to place them in their proper context by considering the issues that were before the U. S. Court of Appeals in *Isaac*. A careful reading of the *en banc* decision in *Isaac* makes it clear that the Court in that case had to resolve three separate issues:

1. Was it error to place the burden of proof upon the issue of self defense on the accused?

2. If so, was that error of constitutional magnitude?

3. If so, was the Petitioner precluded from asserting the constitutional violation in Habeas Corpus because of the waiver concept enunciated in *Wainwright v. Sykes*?

As best as counsel for Mr. Hughes can determine, no member of the Court below denied that the state had erred in making Mr. Isaac (and Mr. Hughes) prove their innocence by establishing that they had acted in self-defense. Thus, upon the first issue the Court appears to have been unanimous.

With respect to the second question, every Judge in the plurality, plus the two concurring Judges, plus Judge Merritt, who dissented, agreed that the error rendered the trial below constitutionally infirm. The dissenting Judges who took the opposite approach did so upon the novel theory that under state law neither the state nor the accused bore any burden of proof upon the issue of self-defense.

(In effect, such a holding would mean that self-defense was irrelevant to any homicide.) But upon the question of whether there was constitutional significance to the jury instruction error, the split of the Court below may be properly characterized as 7 to 3.

On the third question, the *en banc* panel was split 6 to 4, with a clear majority holding that there was no waiver under the standards articulated by *Wainwright v. Sykes, supra*. But in examining the cause of the "soul-searching thought and debate" that Chief Judge Edwards refers to, it is evident that this cause was not the waiver issue, but rather the question of whether the state of Ohio could have elected to enact a different statute than the one in force here and, by that new statute, constitutionally require the accused to bear the burden of proof upon the issue of self-defense.

This issue was injected by the plurality opinion's proffered view that even though

in this case, the state of Ohio had chosen not to place the burden of proof upon the accused, it was free to do so. It was this expression of opinion that prompted responses by Chief Judge Edwards, Judge Jones and Judge Merritt (dissenting on other grounds). Though that disagreement may have been intense, an examination of the record will demonstrate that both the plurality's view and the response by the other Judges was *dicta*. The broader question of whether the state of Ohio could constitutionally place the burden of proof upon the accused was neither raised nor briefed by any of the parties or *amici* in the Court of Appeals below. (This issue was briefed in both the present case and in Mr. Bell's case.)

Mr. Hughes does not deny that the constitutional issue of whether the state may constitutionally require him to prove his innocence by proving that he acted in lawful

self defense is an important one which was reserved in *Hankerson v. North Carolina*, 432 U.S. 233 (1977). However, given the fact that the discussion of this issue in the *Isaac* case was *dicta;* that such expression was obtained without the normal adversary process of briefing and arguing the issue; and that *Isaac* presents a narrower grounds for deciding the instant case, Mr. Hughes respectfully submits that the present case is not the most appropriate one for resolving that weighty issue. Indeed, once final decision is rendered it would appear that the case relied upon by the Petitioner, *Carter v. Jago*, 637 F. 2d 449 (6th Cir., 1980) (Petition for rehearing pending) would be a proper vehicle for the resolution of that question.

The point to be made here is that, contrary to the view presented by Petitioner Engle, the Court below was not "fragmented" upon the important issues of the case. Rather,

the voting upon each of the issues demonstrates unanimity upon the first question presented, a seven to three split upon the second, and a six to four split upon the third. Further, it was not the "waiver" issue upon which the Petitioner seeks Certiorari which caused so much disagreement in the Court below, but rather the wider constitutional issue with respect to the constitutionality of requiring the accused to prove his innocence by proving self-defense. While that issue is an important one deserving the granting of Certiorari, it is not the basis for the Petition in this case and, as set forth above, this case would not be the best vehicle for presenting that question.

C.

THE CONFUSION CREATED BY THE STATE OF OHIO THROUGH ITS LEGISLATURE IN COURTS MAKES THIS CASE ONE INAPPROPRIATE FOR CERTIORARI.

On page 7 of his Certiorari Petition, Mr. Engle refers to the issues in the case at bar as being, *inter alia*, "novel" and "complex." Respondent Hughes agrees with both of those characterizations and would suggest that they are reasons why this Court should not grant Certiorari.

This history of the burden of proof on the issue of self defense in the State of Ohio, the legislature's statutory change in that burden, and the Ohio Supreme Court's inconsistent responses to that change are perhaps unique in the history of the nation. It certainly comes within the label "novel" since neither party has presented to this Court any example where a similar situation has arisen. Mr. Hughes believes that an examination of this history will demonstrate that it is the state of Ohio which, by its own inconsistent actions, has created complexity which counsels against the granting of certiorari. That history may be summarized

as follows.

Prior to 1974 case law interpretation placed the burden of proof on self-defense upon the accused. This action was not based upon the view that self-defense bore no relationship to guilt or innocence. To the contrary, Ohio case law specifically recognized that proof of self-defense was proof of innocence. But the placement of the burden of proof on this issue upon the accused was justified by use of a presumption: that all killings were presumed to be unlawful and that proof of self-defense negated that presumption. *E.g., State v. Silvus*, 22 Ohio St. 90 (1871). Reliance upon such a presumption today would be misplaced, since subsequent developments in this Court have indicated that presumptions of this nature are unconstitutional. *E.g., Barnes v. United States*, 412 U.S. 837 (1973).

In 1974 the Ohio Legislature enacted a comprehensive revision of the Criminal Code.

This included a provision which indicated that on affirmative defenses, the accused had only the burden of going forward and that the state had the burden of proof. In spite of this major change, no mention was made of the change in the comments to the new code, nor in the law review article on the legislative history of the revision which was authored by two of the co-sponsors of the bill, one of which was a lawyer and Chairperson of the House Judiciary Committee. Lehman & Norris, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974).

In its first look at the new statute, the Ohio Supreme Court stated directly that with respect to affirmative defenses the statute required the accused "to prove that issue by a preponderance of the evidence." *State v. Rogers*, 43 Ohio St. 2d 28, 33, 330 N.E. 2d 674 (1975) *cert. den.* 423 U.S. 1061 (1976). But one year later

the same Court, in *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) correctly interpreted the statute to have changed the common law in Ohio on the burden of proof with respect to affirmative defenses. In so holding the majority failed to acknowledge its prior decision in *Rogers* even though that decision was cited by the sole dissenting Judge. *Robinson*, 47 Ohio St. 2d at 118. Moreover, the Court indicated that since the terms used in the statute had a "well-recognized meaning", there could be "no substantial doubt" as to its interpretation, which, in the view of the Court, was "obvious." *Robinson*, 47 Ohio St. 2d at 110.

The following year the State Supreme Court rendered its opinion in *State v. Humphries*, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977). That decision, by invoking the contemporaneous objection rule to limit the application of *Robinson* to cases in which the accused's counsel had actually entered an

objection to the improper jury instruction, set a higher standard of legal scholarship for the practicing bar than the Ohio Supreme Court exercised when acting in its own official capacity. In effect, the Court faulted trial counsel and made clients suffer for that fault, when trial counsel did nothing more than make the very same mistake that Court had made in *Rogers*.

Finally, in subsequent decisions the the Ohio Supreme Court admitted, as it must, that self-defense was relevant to guilt or innocence in that it might raise a reasonable doubt as to the guilt of the accused. The logical corollary is that where self-defense has been properly placed in issue guilt can be established only where the state has proved, beyond a reasonable doubt, that the accused did not act in self-defense. Yet, the Ohio Supreme Court held that it was not error to fail to instruct the jury that the state must establish that the accused did not

act in self-defense. *State v. Abner*, 55 Ohio St. 2d 251, 379 N.E. 2d 228 (1978) and *State v. Chase*, 55 Ohio St. 2d 237, 378 N.E. 2d 1064 (1978). In effect, the State Court held that though self-defense is relevant to guilt or innocence, the jury should not be told how the evidence on self-defense may relate to its judgment upon guilt or innocence.

An examination of these conflicting actions and decisions is required to determine both the constitutional significance of the error in the trial below and whether counsel's failure to object comes within the cause and prejudice standards. Indeed, ultimately one might well conclude that in order to pass judgment upon this case, this Honorable Court would be required to question either the competence, the good faith, or perhaps both, of the State of Ohio. It was for reasons such as this that Chief Judge Edwards was apparently prompted to write:

> "A full understanding of this record has convinced me that this case is not a satisfactory medium for decision of the difficulties inherent in the collision between Ohio's tangled laws pertaining to self-defense and the federal due process standards . . ." (Slip Op. at 12; Petitioners Appendix at A-11.) (Emphasis added.)

Mr. Hughes respectfully submits that these considerations are equally as true on Certiorari. This type of complexity, which arises not from the course of normal legal proceedings, but rather from the inconsistency of the action of official bodies of the state of Ohio, renders this case particularly unsuited for review by the highest Court in the land.

D.

EXTREMELY LIMITED PRECEDENTIAL EFFECT OF THE DECISION BELOW AND, CONSEQUENTLY OF ANY DECISION RENDERED BY THIS COURT UPON THESE CASES, MAKES IT AN INAPPROPRIATE VEHICLE TO FURTHER DEFINE THE CAUSE AND PREJUDICE STANDARD ADVANCED IN *WAINWRIGHT*.

Petitioner Engle attempts to frame his issue in terms of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and argues that the decision of the Sixth Circuit below is in conflict with *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980). But an examination of the *Cole* case indicates that that case is distinguishable from the case at bar in a number of instances. The two most noteworthy factors are: (1) the benefits under *Hankerson* that were claimed in *Cole* derived directly from this Court's prior pronouncements on the constitutional requirement of proving guilt beyond a reasonable doubt and was not tainted by any inconsistent or contradictory actions as the State of Ohio, through its legislature and courts, injected in the case at bar; and (2) to the extent that it can be argued that there was any "confusion" as the meaning of the federal constitutional standard, the state in *Cole* might be able to claim that it was not responsible for that misunderstanding;

but in the case at bar, it was the State itself which caused the confusion and no claim can be made that it relied upon the decisions or interpretations of the federal courts in finding the meaning of its state statute.

More importantly, any decision must be considered within the context of its own facts. The broader and more familiar the factual pattern, the greater the principles of law that can be articulated and the more important is the case for purposes of determining whether Certiorari is warranted. By the same token, the more unique -- in this case bizarre would perhaps be a more appropriate term -- the factual and legal basis of the case, the less precedential value it will have.

In this context, it is important to emphsize the limited application of the *Isaac, Bell & Hughes* decisions, even in *Wainwright* situations:

First. This decision, because it is based upon the unique circumstances of Ohio law, has no general precedential value in any other jurisdiction, including the other States within the Sixth Circuit.

Second. Even as to Ohio, the case only applies to criminal cases and then only to those cases which were tried between January 1, 1974 and November 1, 1978.

Third. Even as to that narrow category of cases, the decision would not affect all criminal cases, but only those in which an affirmative defense was raised. But the holding is even more limited since it would not affect:

(a) Those cases where the accused was acquitted in spite of having to bear the burden of proof;

(b) Those cases in which the State courts have ruled that it was error to give any instruction of the affirmative defense

and hence any error in such instruction was harmless beyond a reasonable doubt; and

(c) Those who have received a final release from the State of Ohio and filed no habeas petition cannot now do so because of the "in custody" requirement.

Fourth. As set forth in Mr. Bell's Brief in Opposition, several of the similar twenty-five cases which Petitioner Engle estimates are still pending are not, in Petitioner's words, "live" cases.

Because of the limited precedential nature of the decision below Mr. Hughes submits that the case does not justify the expenditure of time and resources by this Court on a matter that has already received *en banc* consideration by the Circuit Court.

IV.

CONCLUSION

Respondent Hughes does not in any way

deny that the outcome of this case is extremely important to him. Nor does he deny that counsel for the Petitioner may have an "intense" academic interest in attempting to have this case resolved in his client's favor. However, neither of these factors are justification for the granting of Certiorari. Mr. Hughes has attempted to demonstrate to the Court that because of a variety of circumstances, most of which were caused by the State of Ohio, this case is not one which should be used as a vehicle to expound upon important principles of constitutional law.

Indeed, with respect to the *Wainwright v. Sykes* issue, the Court has already spoken and given general guidance to the lower courts upon the proper application of these principles. It is on the broader self-defense issue that this Court specifically reserved judgment in *Hankerson v. North Carolina, supra,*

which is deserving of the attention of the Court. *See Holloway v. McElroy*, 632 F. 2d 605 (5th Cir., 1980). Given the choice between granting Certiorari in an area where this Court has already given guidance through its decision in *Wainwright v. Sykes* and a case which is recognized as causing a problem to the lower courts on an issue which is specifically reserved, *Hankerson v. North Carolina, supra*, it would appear that the latter would be much more deserving of the attention of this Court.

Of course, as previously indicated, while this issue was discussed in the principal opinion, *Isaac*, that decision does not rest upon that issue and the expression of opinion on that question was *dicta*. Consequently, it would seem inappropriate to attempt to utilize Mr. Hughes' case as a vehicle to dispose of that wider question.

For all the foregoing reasons, Mr. Hughes submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD L. AYNES

Appellate Review Office
School of Law
University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent
Howard Hughes

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief in Opposition were sent by first class mail to counsel for Petitioner, William J. Brown, Simon B. Karas, and R. David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, on this day of March, 1981. The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio, 45601.

RICHARD L. AYNES
Counsel for
Respondent Hughes

Office-Supreme Court, U.S.
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CLERK

Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,

v.

LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,

v.

KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,

v.

HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEFS IN OPPOSITION TO CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

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STATEMENT OF THE CASE

In Isaac's answer to the petition, Isaac states "There was no evidence except the testimony of the defendant and the victim as to who threw the first punch". Page 2. That statement is a misstatement. At trial, Isaac's ex-wife testified as to seeing Isaac initiate the assault on the victim which resulted in serious injuries. Bell and Hughes, like petitioners and the courts below, have recognized that the questions involved in these cases are matters of law far transcending the facts of the individual cases. Accordingly the disputed versions of the facts in those cases have not been argued in the respective answers to the petition.

REPLY ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. IMPACT OF DECISION

To characterize this case as "Much Ado About Nothing" is a misrepresentation of the first order. Respondents Hughes and Isaac both point to the fact that in the interim of the legal proceedings below they received final releases as a matter of parole, thus terminating the possibility of their reincarceration. It is incongruous at best however that having successfully undermined the finality of Ohio convictions between 1974-1978 involving affirmative defenses that Hughes and Isaac should assert finality as a defense to why certiorari should not be granted. While conceding that the interest of a particular custodian may be academic, such custodians as agents of the State and as represented by the chief law enforcement agent of such State are proper parties to present to this Court the havoc caused by the decisions of the court below. It would be a travesty indeed if the State of Ohio were required to free even one person convicted of homicide under the decision of he court below. Yet Isaac and Hughes, who would have every right to seek certiorari, if roles were reversed, seek to insulate what they have accomplished.

Petitioners noted in the initial petition the status of the parties so as not to misrepresent to this Court the actual relationships of the parties. Respondent Bell, whose case is

still "live" to the extent he remains in prison, seeks to argue that the decision affects only 25 cases, the figure of actual cases at the time the petition was filed. Yet it is the potential which should control. New cases have been filed and bail has been sought by convicted criminals - including Bell - based on such cases as precedent. That the floodgates have not opened more in the interim is simply a factor that the courts below are awaiting this Court's decision on certiorari. In the interim, it should be noted that the Sixth Circuit has utilized the precedent of the cases below in other contexts, **Carter v. Jago**, 637 F. 2d 449 (6th Cir. 1980), and will continue to do so. While Issaac and Hughes may never be reincarcerated, their cases serve as useful representative samples of the context in which a live case like **Bell** should be decided.

As an attack on the impact of the cases, Bell and Hughes argue that the case has no precedential value in any other jurisdiction than Ohio, that the Sixth Circuit was not as split in their decision making as the opinion might appear and that no conflict is presented with other circuits. Such arguments are devoid of reality. Petitioner's whole argument is that the Sixth Circuit misapplied **Wainwright v. Sykes**, 433 U.S. 72 (1977), a case of national application. While admittedly, the context in which a **Wainwright** issue is raised might vary from jurisdiction to jurisdiction, the need for a uniform application of "cause and prejudice" is evident. These cases allow the court the opportunity to flesh out the parameters of "cause and prejudice". Moreover, this Court will have to determine for itself how split the Sixth Circuit was in resolving these cases. Petitioners would merely note the tremendous expenditure of judicial resources in reaching what respondents now seek to characterize as a "uniform" decision. Finally the Court should note the holding in **Cole v. Stevenson**, 620 F. 2d 1055 (4th Cir. 1980), not the distinction in facts to determine if a conflict in circuits exists. Petitioners assert that under the rationale of **Cole** - a correct reading of **Wainwright** - the result in these cases should be reversed.

As a final attack on the impact of these cases, Bell and Hughes argue that it is unnecessary to resolve the question of whether the constitution would allow a shifting of the burden of proof on self defense - asserting that this might more properly be raised when **Carter**, *supra* eventually reaches the Court. To this extent, this position has completely reversed from the briefs in the courts below. Therein, the argument was

posited that under Ohio law no affirmative defenses could constitutionally exist. Moreover, such argument attempts to end run the question presented by petitioners - if the constitution allows a shifting of the burden of proof on self defense, are criminal defendants deprived a fair trial when a state court instructs to such effect in contravention of a state statute which requires more? While such might be error under state law, does it automatically convert to a question of federal due process? The prior precedents of this Court are simply to the contrary. **Beck v. Washington,** 369 U.S. 541 (1962); **Wainwright v. Stone,** 414 U.S. 21 (1973); **Snowden v. Hughes,** 321 U.S. 1 (1943); **Milwaukee Electric Ry. Co. v. Wisconsin,** 252 U.S. 100 (1920). See also: **Bishop v. Mazurkiewicz,** 634 F. 2d 724 (3rd Cir. 1980). This is even more important when one considers that at some point: "the costs of retroactive application of new constitutional principles . . . exceed the possibility of enhanced reliability that may be obtained upon retrial". **Blackburn v. Thomas,** _____U.S._____, 49 U.S. 4210, 28 Cr. L. 2044 (February 23, 1981) Powell J., dissenting from certiorari.

B. COUNTER ARGUMENTS ON THE MERITS

All parties seem to recognize this case as complex. Yet in arguing against certiorari, Hughes and Bell argue Ohio is equitably estoppel by the "tangled nature" of Ohio precedent. Even a casual reading of the Ohio cases however will establish that the Ohio Supreme Court was making a conscientious effort to track the latest developments by this Court in the area of constitutional law. In **State v. Robinson,** 47 Ohio St. 2d 103 (1976), the Court, while not making a constitutional decision, was clearly aware of **Mullaney v. Wilbur,** 421 U.S. 684 (1975) in interpreting ORC Section 2901.05. Similarily, in resolving in **State v. Humphries,** 51 Ohio St. 2d 95 (1977) that a **Robinson** error would be deemed waived if no objection was raised, the Ohio Supreme Court was clearly aware of **Hankerson v. North Carolina,** 432 U.S. 233 (1977). Respondents simply assert that the Ohio Supreme Court should be forbidden to do as a matter of state law what this Court has done with respect to constitutional matters. Moreover as the ultimate irony, respondents assert that in attempting in good faith to avoid a potential **"Mullaney"** problem, the Ohio Courts created one.

In reaching this irony, respondents completely misstate Ohio law. Bell and Hughes argue that the shifting of the burden of proof on self defense under prior law was justified by a presumption as to the elements of the offense. **State v. Poole,** 33 Ohio St. 2d 18 (1973) is directly to the contrary - self defense is a true affirmative defense wholly apart from the elements of the crime. Secondly, Bell and Hughes argue that **State v. Abner,** 55 Ohio St. 2d 251 (1978) further tangled Ohio's law by eliminating an instruction on the state's burden to disprove an "element" of the offense - the absence of self defense. **Abner** merely clarified that despite the state statutory shift in the burden of proof on affirmative defenses - self defense still remained an affirmative defense and not an "element". As aptly stated by this Court:

> We usually walk on treacherous ground when we explore state law [footnote omitted] for state courts, state agencies, and state legislatures are its final expositors under our federal regime.

Brady v. Maryland, 373 U.S. 83, 90 (1963). See also: **Tennon v. Ricketts,** 574 F. 2d 1243 (5th Cir. 1978), *cert. denied,* 439 U.S. 1091; **United States ex rel Almeida v. Rundle,** 255 F. Supp. 936 (E.D. Pa.), *aff'd,* 383 F. 2d 421 (3rd Cir. 1967), *cert. denied,* 393 U.S. 863 (1964). By raising a question of error of state law to constitutional dimension, the courts below failed to heed this admonition.

Isaac's answer to the petition for certiorari returns to the panel decision - not relied on by the en banc court - and argues that Ohio's use of the contemporaneous objection rule to differentiate between those defendants who obtain the benefit of **Robinson** is arbitrary and capricious.[1] Aside from the fact that Ohio followed the suggestion of this Court in **Hankerson,**

---

1 Isaac makes a further argument of denial of equal protection never raised in any court below. For the first time Isaac asserts discrimination between those persons who had jury trials and those tried to a court. The premise is that Rule 30, Ohio Rules of Criminal Procedure - the contemporaneous objection rule - is inapplicable to non-jury trials. Aside from the fact this is a new argument, there is nothing irrational about drawing a distinction between a self instructed trier of fact who is presumed to know the law and a jury which must be instructed as to controlling principles. **State v. Humphries,** *supra.*

such argument must fail. Apparently, Isaac would concede that Ohio did not need to make **Robinson** retroactive:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court though later overruled, are law nonetheless for intermediate transactions.

Great Northern R. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358, 364 (1932); See also; **Wainwright v. Stone**, *supra*. Yet when Ohio limited its holding of retroactivity to those who raised the issue and sought to have it resolved, the decision somehow becomes arbitrary and discriminatory. Isaac's view simply gives no credence to the role of counsel in our system.

Our system of jurisprudence guarantees competent counsel. It does not however guarantee that all counsel will be of equal capabilities. Some counsel will perceive a new issue and raise it, thereby changing the law. Others will not have such foresight. To have a rationale system of jurisprudence, it is simply not necessary, or perhaps even desirable, that our system insures each defendant the benefits secured by the most able. An example is this Court's decision in **Brady v. United States**, 397 U.S. 742 (1970). There, like here, a waiver of a claim was being challenged on the basis that a subsequent decision had changed the parameters of the law which existed at the time of the waiver. Yet in rejecting the notion that the waiver should be disturbed, the Court forcused on the fact that when made the waiver was due in part to the actions of competent counsel. In doing so, the Court further rejected the notion that all defendants should get the benefit of a subsequent decision even though some defendants, who pursued the issue by trial and appeal would get such benefit.

In large measure, the "cause and prejudice" standard of **Wainwright** to be meaningful must be closely equated with the notion of ineffectiveness of counsel. If the failure of competent counsel to anticipate a new argument which some counsel do anticipate is "cause", then **Wainwright** returns to the "deliberate bypass standard" of **Fay v. Noia**, 372 U.S. 391 (1963). In the end, finality and society are the losers.

CONCLUSION

The present cases involve novel, complex and important issues to both the State of Ohio and the nation. Certiorari should be granted.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Reply Brief to Briefs in Opposition to Certiorari have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____day of April, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, No. 141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302, Howard Hughes, c/o Beasley Suites, 163 Rhodes Avenue, Akron, Ohio 43302.

SIMON B. KARAS
Counsel of Record

Office-Supreme Court, U.S.
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CLERK

CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON PETITION FOR WRIT OR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMICUS CURIAE BY OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OHIO PROSECUTING ATTORNEYS ASSOCIATION
J. STANLEY NEEDLES
Prosecuting Attorney, Hancock County, Ohio
1330 North Main Street
Findlay, Ohio 45840
(419) 422-2235

SIMON B. KARAS
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

1. CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS?

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433 U.S. 72 (1977)

STATUTORY SECTIONS:
Ohio Revised Code, Section 2901.05

STATEMENT OF THE CASE

Isaac

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon an affirmative defense of self defense. No objection was entered to an instruction that Isaac bore the burden of proof on self defense by a preponderance of the evidence.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. Therein, Isaac relied on the newly decided case of *State v. Robinson,* 47 Ohio St. 2d 103 (1976). In *Robinson,* the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[1] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries,* 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

---

[1]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41).

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitary and capricious and thus a denial of due process. (A26. As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se requires negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents (A20) and (A21) would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

Bell

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which had had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio and the Ohio Supreme Court raising issues not pertinent herein. Said appeals were respectively denied on April 8, 1975 and September 16, 1976.

Thereafter, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction on self defense.

On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49). On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

Hughes

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial

and raised no objection to an instruction that he bore the burden of proof of the affirmative defense of self defense by a preponderance of the evidence. In fact, Hughes' counsel specifically requested the charge that was given.

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court. Said appeals were respectively denied on September 24, 1975 and March 16, 1976, both in advance of the decision in *Robinson*. No contention was made in either appeal that the instructions on self defense violated due process.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. Therein, Hughes challenged the constitutionality of the instruction on self defense.

On June 26, 1979, the district court, after interim orders requesting briefing on exhaustion of state remedies and the merits, issued its opinion denying the petition. (A62). The district court found alternatively that Hughes' burden shifting claim was waived by failure of objection and that the instruction itself did not violate federal due process.

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 21, 1980. (A61).

ARGUMENT

CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS.

What is at issue in this appeal is whether the defendant must call a trial court's attention to an issue of jury instructions at trial or merely wait and take his chance, and whether he can request a jury instruction and later in a Federal Habeas Corpus repudiate his position for one that appears advantageous. In each of the cases here appealed, the defendant did not object to the trial courts instructions on the burden of proof of an affirmative defense and in *State v Hughes*, counsel requested the complained of charge be given.

Ohio law is clear on the point of objecting to jury instructions at a time when something can be done: a defendant cannot wait and raise the issue of incorrect instructions after trial. The Ohio Supreme Court, in summarizing the law in this area, said in *State v Lancaster*, 25 Ohio St. 83, 267 N.E. 2d 291 (1971):

> In the case of *State v Childs* (1968), 14 Ohio St. (2d) 56, 43 0.0. (2d) 119, 236 N.E. (2d) 545, certiorari denied, 394 U.S. 1002, we stated in paragraph three of the syllabus:
>
> "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v Glaros*, 170 Ohio St. 41, 11 0.0. (2d) 215 (166 N.E. (2d) 379), approved and followed.)" Accord *State v Johnson* (1968), 14 Ohio St. (2d) 67, 43 0.0. (2d) 126, 236 N.E. (2d) 552.
>
> We also re-assert the doctrine we stated at page 62 (of 14 Ohio St., 123 of 0.0. (2d) of the *Childs* case: "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time. *State v Davis* (1964), 1 Ohio St. (2d) 28, 30 0.0. (2d) 16 (203 N.E. (2d)

357)." The interest of the state in the requirement of timely objection to improper evidence has been recognized in several United States Supreme Court decisions. Compare *Douglas v. Alabama* (1965), 380 U.S. 415; *Henry v. Mississippi* (1965), 379 U.S. 443.

The Respondents tried these cases without raising the issue of the burden of proof but lost, so now they are asserting the improper instruction as an error. In *State v. Tudor,* 154 Ohio St. 249, 95 N.E. 2d 385 (1950):

> A fair administration of justice requires that, when an error occurs in a trial, the trial judge should be given an opportunity, if possible, to correct it. Otherwise, a party could take a chance on success without raising any objection to such error, and then, if he failed to succeed, avail himself of an error which might otherwise have been corrected. See 3 American Jurisprudence, 25 *et seq.*, Section 246.
>
> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial judge to give faultless instructions upon every possible feature of the case. This would disregard entirely the true relationship between the court and counsel which enjoins upon counsel the duty to exercise dilligence and to aid the court, — not by silence to mislead the court into the commission of error. (Emphasis added).

This United States Supreme Court has recognized the validity of the contemporaneous objection rule. In *Hankerson v. North Carolina,* 432 U.S. 233, 244 (1977) the Supreme Court hinted at it in a footnote:

> Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burdenshifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior

to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See e.g., Fed Rule Crim Proc 30. (Emphasis added).

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) that court said:

> The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than Fay gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. *A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding.* It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. While the 1966 amendment to Section 2254 requires deference to be given to such determinations made by state courts, the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds.
>
> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nontheless convict the defendant, and he

will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to Section 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honor a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal write of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

• • • •

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. *To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify.* Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification. (emphasis added). *Id.* at 88-90.

In *Wainwright v. Sykes*, the federal courts had ordered a hearing regarding the voluntariness of a confession where the matter had not been raised at trial and had been rejected by the state courts. The Supreme Court indicated that the Florida courts were bound by the contemporaneous objection rule indicating two bases for the rule: first that it supports finality, and second, to a lesser degree, it prevents sandbagging.

This is the issue confronting this court; and this Court has spoken giving its approval to the use of the contemporaneous objection rule.

Had this issue been raised at trial, as suggested in *Sykes*, the State might have dealt with the entire issue by assuming the burden of disproving the affirmative defense, thus avoiding the current problem. Now, long after the incident in this, and many other cases which will inevitably wind their way trough the courts in years to come, the prosecutor will have to attempt to locate real evidence, which may have been destroyed, and witnesses, who may have moved, died, or forgotten. Trying cases long after the incident is all but impossible for the State. This particularly true, in homicide cases. The issues of insanity, self defense, and intoxication are frequently involved in shootings, knifings and robberies. These factors indicate the need for the contemporaneous objection rule. Cases should be tried once, near the time of the incident, not years later when memories fade.

It is suggested that the contemporaneous objection rule applys to the constitutional claim that the Defendant should not have had the burden of proof but does not apply to statutory claim under then *Ohio Rev. Code Section* 2901.05. The resolution of both of these claims ends in the same result: an instruction by the trial judge on the burden of proof regarding affirmative defenses. If the contemporaneous objection rule applys to one reason for an instruction it applys to other reasons for an identical instruction.

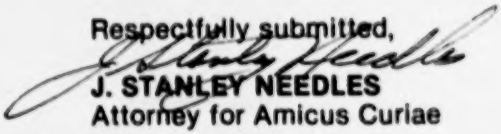
The heroic effort of the Sixth Circuit to find a failure of due process creates chaos with Ohio law, *Wainwright v. Sykes* and the Constitution.

Thus, Ohio's choice of using the contemporaneous objection rule should not be overturned by this court.

CONCLUSION

The Ohio contemporaneous objection rule serves a number of purposes; one of the most important is finality. The Petitioner having failed to raise the issue at trial, cannot raise it later. This court should affirm the District Court in rejecting belated objection to the jury instructions, and reverse the United States Court of Appeals Sixth Circuit.

Respectfully submitted,



J. STANLEY NEEDLES
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing brief have been served on James R. Kingsley, 157 W. Main Street, Circleville, Ohio, 43113, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Hughes, and upon Simon B. Karas, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by U.S. Mail, postage paid, this 25 day of March, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio, 43113; Kenneth Bell, #141-727 Marion Correctional Institution, P.O. Box 57, Marion, Ohio, 43302, Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

J. STANLEY NEEDLES
Counsel for Ohio Prosecuting
Attorneys' Association

AFFIDAVIT

STATE OF OHIO)
) ss.
COUNTY OF HANCOCK)

J. Stanley Needles, Prosecuting Attorney for Hancock County, Ohio, Amicus Curiae for the Ohio Prosecuting Attorneys' Association, being duly sworn, deposes and says that he deposited in the United States Mail, United States Postal Department, forty (40) copies of the Motion and Proposed Brief in the aforecaptioned matter on this 25th day of March, 1981, addressed to the Clerk of the Supreme Court of the United States of America, One (1) First Street NE, Washington D.C. 20543, postage prepaid.

J. STANLEY NEEDLES

J. Stanley Needles, being first duly sworn, deposes and says that the foregoing affidavit is true.

Notary Public

SHIRLEY A. MILLER, Notary Public
STATE OF OHIO
My Commission Expires Jan. 2, ~~1977~~ 1985

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ALEXANDER L. STEVAS,
CLERK

CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Officer Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

PARTIES

In addition to the parties listed on the front cover of this brief, the Ohio Prosecuting Attorneys Association appeared as amicus on behalf of petitioner (then appellee) Engle in *Isaac v. Engle*, F. 2d , (No. 78-3488, 6th Cir. 1980) upon rehearing en banc. The Ohio Public Defenders Association and the Appellate Review Office, a subdivision of the clinical program of the School of Law of the University of Akron appeared as amici for respondent (then appellant) Isaac.

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OPINIONS BELOW

The decision of The United States Court of Appeals for The Sixth Circuit in *Isaac v. Engle*, F.2d (No. 78-3488), 6th Cir. 1980), upon rehearing en banc is not yet reported. (A1)[1] The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* is not yet reported (A24). The decision of the United States District Court For The Southern District of Ohio, Eastern Division in *Isaac v. Engle*, is unreported. (A38).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini*, (No. 79-3153, 6th Cir. 1980) is reported at 635 F. 2d 575. (A42). The decision of the United States District Court For The Northern District of Ohio, Western Division in *Bell v. Perini*, is unreported (A49).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle*, (No. 79-3570) is unreported. (A60). The decision of the United States District Court For The Northern District of Ohio, Eastern Division in *Hughes v. Engle* is unreported. (A63).

JURISDICTION

The panel decision of The United States Court of Appeals For the Sixth Circuit in *Isaac v. Engle, supra* was entered February 8, 1980. (A24). Rehearing en banc was granted March 24, 1980. (A36). The en banc decision in *Isaac v. Engle, supra* was entered December 12, 1980. (A1).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini, supra* was entered December 12, 1980. (A42).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle, supra* was entered December 18, 1980. (A60).

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on February 23, 1981. Certiorari was granted by Order of April 20, 1981.

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[1]References to the appendix to the petition for writ of certiorari are designated as "A". References to the joint appendix to this brief are designated as "JA".

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code (Page's) Section 2901.05A (Eff. 1-1-74)

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Ohio Rev. Code (Page's) Section 2901.05A (Eff. 11-1-78)

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

Rule 30, Ohio Cr. R.P. (Am. 7-1-75)

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. Copies of such requests shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.

A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Ohio Cr. R.P. (Eff.7-1-73)

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

ISAAC

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon the affirmative defense of self defense. In opening argument, defense counsel presented to the jury the theory that the defense would prove its burden of proving self defense by a preponderance of the evidence, and in closing argument contended that such burden had been met. (Isaac Tr. 12, 189, 201)[2] The trial court gave the traditional instruction in Ohio that the defendant had to prove the affirmative defense of self defense by a preponderance of the evidence. The trial court further instructed that failure to meet such burden did not relieve the State of its obligation to prove the elements of the offense beyond a reasonable doubt. (Isaac Tr. 227-230)(JA 3-5). Despite various objections to the charge, including the definitional terms of self defense (Isaac Tr. 234, 235, 239-240), no objection was entered to the above charge.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. By a supplemental assignment of error, Isaac relied on the newly decided case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976). In *Robinson*, the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[3] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given. (JA6).

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[2]References to *State v. Isaac*, No. 75 CR-83, CCP, Pickaway County.

[3]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries*, 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41). The district court further stated, "Petitioner has not made a showing of either cause or *actual* prejudice". (A41). Emphasis added.

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitrary and capricious and thus a denial of due process. (A26). As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). As such, the concurrence simply found that the *Robinson* error "must take precedence over a state's procedural concerns expressed in a contemporaneous objection rule". (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se required negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a

new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents, (A20) and (A21), would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

BELL

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which he had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio. Therein, Bell raised no challenge to the instruction of self defense. The appeal was denied on April 8, 1975 (JA15). A subsequent appeal to the Ohio Supreme Court, again failing to raise any challenge to the self defense instruction, was denied on September 16, 1976.

On August 1, 1978, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction given. On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49).[4]

Thereafter, Bell moved for reconsideration on the basis that the correct issue in controversy was the failure of the Ohio Courts to apply *Robinson* to him. On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

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[4]No transcript was submitted to the district court. The decision was rendered solely on the question of law presented by Bell.

HUGHES

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial and raised no objection to an instruction that he bore the burden of proof of the affirmative defense of self defense by a preponderance of the evidence. (Hughes Tr. 342-343)[5] (JA45-46). In fact, and despite several objections to the instructions based on recent changes in Ohio law, (Hughes Tr. 348, 354), Hughes' counsel specifically requested the charge on self defense. (Hughes Tr. 288-289). (JA42). The charge was given over the State's objection. (Hughes Tr. 288-289). (JA42).

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio. Therein Hughes raised no assignment of error as to the validity of the instruction on self defense. As pertinent to a challenge to the weight and sufficiency of the evidence, the appellate court stated:

> The jury had sufficient evidence before it, including the testimony of the defendant, who testified to support his own defense. Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury had a right and did find against defendant's claim of self defense. . . .

(JA52) By order of September 24, 1975, the appellate court affirmed the conviction. (JA51). A subsequent appeal to the Ohio Supreme Court was denied on March 16, 1976.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. As pertinent, Hughes alleged:

> The prosecution failed to prove that the accused was guilty as to each and every element of the offense charged and the trial court failed to so instruct the trial jury.

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[5]Reference to *State v. Hughes*, No. 74-11-1206, CCP, Summit County.

(Hughes' petition, page 4). Believing a weight and sufficiency allegation was being presented, a Return of Writ admitting exhaustion of state remedies was filed. Subsequent pleadings and a August 18, 1977 report and recommendation of a Magistrate that the writ be denied (JA24) clarified that Hughes was raising for the first time a challenge to the instruction. By orders of November 2, 1978 (JA40) and June 4, 1979 (JA38), the district court requested briefing on the question of exhaustion of state remedies and found exhaustion solely on the unavailability of further state appellate remedies. On June 26, 1979, the district court issued its opinion denying the writ on the alternative bases that Hughes' burden shifting claim had been waived by failure of objection and that the instruction itself did not violate federal due process. (A62).

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 12, 1980. (A61).

STATUS OF THE PARTIES

During the interim of the proceedings in the courts below, Hughes and Isaac were first granted parole and then final releases as a matter of parole, (as opposed to final release by expiration of maximum sentence), and thus have served their sentences. Bell is still in prison.

SUMMARY OF ARGUMENT

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court set forth a two part "cause and prejudice" standard to be utilized in judging whether a state procedural waiver of a federal constitutional claim would be given deference in federal habeas corpus. In rejecting the conclusion of the district courts that "cause" had not been shown, three separate rationales were advanced by the appellate court. The view of the plurality in *Isaac v. Engle, supra* was that an objection would have been futile in light of well settled law. The appellate court however defined futility in such an expansive manner as to render the "cause" requirement a nullity. The appellate court adopted a view that the only purpose of a contemporaneous objection rule is to raise objections based on the then current state of the

law. Petitioners' position is that this view gives little or no credence to either the true role of counsel in our legal system or the validity of contemporaneous objection rules as legitimate procedural devices.

In *Wainwright*, this court noted that a trial should be the main event in the criminal law process. Contemporaneous objection rules are valid means to encourage that result. If "cause" however is limited to the failure to object to only known errors, there is little or no incentive to change the law. In the process the contemporaneous objection rule loses all meaning.

The concurrence of Judge Jones (A12) adopted the majority panel decision in *Isaac* that the failure to apply *State v. Robinson* to those who failed to object is arbitrary and capricious. Such view mistakes the notion of finality in our criminal process. It is also an unwarranted rejection of the direction given by this Court in *Hankerson v. North Carolina*, 432 U.S. 233 (1977). There is nothing arbitrary or capricious about drawing the balance between finality and constitutional right on the basis of those who have earned it. Our criminal system guarantees competent counsel and nothing more. It does not however guarantee that all defendants will get the benefits secured by the most able counsel. By equating "cause" with the failure of competent counsel to discover a change in the law, the panel returns to "deliberate bypass".

Judge Celebreeze's concurrence in the panel decision in *Isaac* (A33) took the view that a showing of prejudice could override legitimate state procedural concerns. This Court in *Wainwright* however adopted a "cause *and* prejudice" test. Judge Celebreeze's view merges the two components and eliminates "cause" as a *Wainwright* factor.

II.

In *Patterson v. New York*, 432 U.S. 197 (1977) this Court indicated that a State may consistent with due process place the burden of proof of an affirmative defense on a defendant. Following *Patterson*, petitioners contend that self defense may be labeled as an affirmative defense and the burden of proof allocated in the above manner. As a matter of state law, *Robinson* defined the burden of proof differently; as such, the instruction given was a violation of state law. The instruction

itself however did not violate federal due process. It was error with respect to a non constitutionally required instruction on a matter collateral to the existence or non existence of the elements of the crime.

In rejecting such view the appellate court construed *Robinson* to create a new functional element of "absence of the affirmative defense". This was a misconstruction of Ohio law. *State v. Poole*, 33 Ohio St. 2d 18 (1973). Even after *Robinson*, self defense remained an affirmative defense. Thus despite the *Robinson* error, no element of the crime was presumed.

ARGUMENT

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

A. *WAINWRIGHT V. SYKES*

IN *Wainwright v. Sykes, supra*, this Court comprehensively addressed the question of what standard should be applied in obviating a state procedural default on a question of federal constitutional law. In rejecting the prior "deliberate bypass" test of *Fay v. Noia*, 372 U.S. 391 (1963), this Court attempted to reinject some notion of finality in our criminal law system:

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding; the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await

> their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
>
> We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be a determinative federal habeas hearing. There is nothing in the Constitution or in the language of Section 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection

Wainwright v. Sykes, supra at 90. By construing cause in the manner that it did, the appellate court has frustrated that goal:

> If, as this court holds, a change in the interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the state's contemporaneous objection rules.

(A22) Kennedy, J. dissent. It is thus to the various justifications, advanced by the appellate court that attention should be directed.[6]

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[6]The finding of "cause" allowed the appellate court to avoid a more direct challenge to *Wainwright*. As an initial response to *Wainwright*, the appellate court found it inapplicable to a state system which had a plain error review mechanism. This was true even if the State court had rejected the claim as "plain error". *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied*, 439 U.S. 955, *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978), *Cook v. Bordenkircher*, 602 F. 2d 117 (6th Cir. 1979), *cert. denied*, 444 U.S. 936, *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978); *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980). In *Hockenbury v. Sowders*, 633 F. 2d 443 (6th cir. 1980), the appellate court retreated from such position—and rightly so. Such view of *Wainwright* is an unwarranted extension of the notion that a State may waive compliance with its procedural requirements and undercuts the purpose of the *Wainwright* decision—to give deference to legitimate state procedural concerns. It also runs contrary to

B. FUTILITY OF OBJECTION

The appellate court correctly noted that few Ohio counsel prior to *Robinson* objected to the traditional instruction on self defense. Few indications existed that O.R.C. Section 2901.05(A) had worked the change that it did. The Ohio jury instructions had not been amended, the committee notes that accompanied the statute reflected no change and various treatises reflected no variance wiith prior law. Similarly, in *State v. Rogers*, 43 Ohio St. 2d 28, 33 (1975), decided after O.R.C. Section 2901.05 had been enacted but prior to *Robinson*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse and justification and is, therefore, an affirmative defense (R.C. 2901.05[c] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence.

What the appellate court did however was to equate the notion that any time there is a change in the law, there is futility of objection prior to such time.

In *O'Connor v. Ohio*, 385 U.S. 92 (1966), this Court rejected the notion that a contemporaneous objection rule could bar relief for an antecedent violation of *Griffin v. California*, 380 U.S. 609 (1965) which was applicable to the defendant's trial. *Tehan v. Shott*, 382 U.S. 406 (1966). In *O'Connor* however, the defendant's trial occurred prior to the Fifth Amendment even having been made applicable to the States. The predicate for the challenge had not been laid. In the present situation, O.R.C. Section 2901.05(A) had been enacted. All counsel were aware that Ohio had recodified its criminal law and procedure and some counsel had raised the issue and been successful on it.

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this Court's admonition in *Henderson v. Kibbe*, 431 U.S. 145 (1977), that challenges to a state court's instructions to the jury require a greater showing than "plain error". As applied to the present case, Ohio had clearly held that a *Robinson* error was waived, pursuant to Rule 30, Ohio Cr. R.P., by failure to object, and was not, pursuant to Rule 52(B), Ohio Cr. R.P., plain error. *State v. Humphries, supra; State v. Williams*, 51 Ohio St. 2d 112 (1977); *State v. Long*, 53 Ohio St. 2d 91 (1978); *State v. Slone*, 45 Ohio App. 2d 24 (CA Franklin, 1975).

State v. Robinson, supra.[7] Moreover, in a larger sense, the question of burden shifting is not new. The trial in *Isaac* occurred 3 months following *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and more than 5 years after *In re Winship*, 397 U.S. 358 (1970). As found by Judge Kennedy in dissent (A22), "although it may have been difficult to anticipate when the Ohio Courts would recognize that their procedure may violate *Mullaney* and *Winship*, or the exact manner in which the rule of those cases would be applied, the rule itself was not new or unanticipated". While the decision in *Robinson* may not generally have been anticipated, it was not unanticipatable.

The problem with the plurality's analysis is that it relieves counsel from any obligation to attempt to change the law and removes any possibility of waiver. Presumably if the objection is well known, the failure to make it will be deemed ineffectiveness of counsel. *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974). On the other hand, if the objection is not perceived until a subsequent decision is rendered, then "cause" is found in the lack of anticipation. Such interpretation renders *Wainwright* a nullity.

The law is frequently in flux and the path that it will take is unclear. This is hardly a reason to remove the requirement that a defendant make known his claims at trial. In *State v. Williams, supra* at 117, the Ohio Supreme Court succinctly stated:

> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error.

The appellate court below itself recognized this in *Mars v. United States*, 615 F. 2d 704, 707, (6th Cir. 1980);

> As stated above, unless we accord retroactive application to the *Mauro* decision no violation of the IAD occurred in the present case. In light of our conclusions that appellant waived any IAD claim he may have had and that Section 2255 is not an appropriate vehicle to raise appellant's IAD claim, we need not decide whether *Mauro* should receive retroactive application.

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[7] In *State v. Robinson*, 48 Ohio App. 2d 197 (CA. Franklin 1975), the lower appellate court decision, the Court of Appeals noted that they were bound by their prior unreported decision in "*State v. Mathews*, No. 74 AP-428, decided December 24, 1974, ..." 48 Ohio App. 2d *supra* at 200.

Finally, it appears to be the better reasoned response of the various appellate courts.[9] *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980) (en banc); *Indiviglio v. United States*, 612 F. 2d 624 (2nd Cir. 1979), *cert. denied*, 445 U.S. 933 (1980); *Polizzi v. United States*, 550 F. 2d 1133 (9th Cir. 1976); *Dumont v. Estelle*, 513 F. 2d 793 (5th Cir. 1974). See particularly *Tyler v. Phelps*, 622 F. 2d 172 (5th Cir. 1980) [Decision on rehearing, 643 F. 2d 1095 (5th Cir. 1981)] where the appellate court upon rehearing changed its initial opinion and found an absence of cause. If the failure to object will be excused because objection was either unanticipated or thought futile, there is little incentive to either change the law or examine it for recent developments. Trials, once thought final, will be relegated to the position of a "tryout on the road". *Wainwright, supra* at 90.

C. RETROACTIVITY AND EQUAL PROTECTION

The panel decision in *Isaac*, approved by Judge Jones in concurrence on en banc hearing (A12) appeared to take the view that if a decision is held to be retroactive, it may not be limited to any class of persons affected by such decision. Such view mistakes that retroactivity has two components—the temporal aspects of the period to which it should be applied and the class of persons within such time frame to whom it should be applied. This Court has frequently struggled to adopt a unified theory of retroactivity as to both components. The temporal aspect need not be discussed here as the Ohio Supreme Court in *State v. Humphries, supra* held *Robinson* temporally applicable to all persons tried after the effective date of O.R.C. Section 2901.05A, —January 1, 1974. As to the class component, the suggestion has frequently been made that even though a decision is fully retroactive in time, it should be limited to appellate as opposed to collateral cases. *Williams v. United States*, 401 U.S. 646 (1971); *Mackey v. United States*, 401 U.S. 667 (1971). In more recent cases, however the balance between finality and constitutional right has settled not on whether the action was direct or collateral, but on whether the error was preserved. *Lee v. Missouri*, 439 U.S. 461 (1979); *Harlin v. Missouri*, 439 U.S. 459 (1979). Most recently, this Court stated in the context of the retroactivity of *Mullaney, supra:*

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[9]For a most recent example from this Court, see *Steagald v. United States*, ——U.S.——, 68 Led. 2d. 38, 44 N. 5(1981).

> The States, if they wish may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977).

One irony of these cases is that Ohio's reliance on the above statement in *Hankerson* was found by the panel to be "arbitrary and capricious". (A31). *Hankerson* was dismissed as mere "dicta". (A27). The stated reason was that the panel found no rational relationship between applying a contemporaneous objection rule to a retroactive decision. The panel's view gives no credence to the role of counsel in our system.

Our system of jurisprudence guarantees competent counsel. It does not however guarantee that all counsel will be of equal capabilities. Some counsel will perceive a new issue and raise it, thereby changing the law. Others will not have such foresight. To have a rationale system of jurisprudence, it is simply not necessary, or perhaps even desirable, that our system insures each defendant the benefits secured by the most able. An example is this Court's decision in *Brady v. United States*, 397 U.S. 742 (1970). There, like here, a waiver of a claim was being challenged on the basis that a subsequent decision had changed the parameters of the law which existed at the time of the waiver. Yet in rejecting the notion that the waiver should be disturbed, the Court focused on the fact that when made the waiver was due in part to the actions of competent counsel. In doing so, the Court further rejected the notion that all defendants should get the benefit of a subsequent decision even though some defendants, who pursued the issue by trial and appeal would get such benefit.

In large measure, the "cause and prejudice" standard of *Wainwright* to be meaningful must be closely equated with the notion of ineffectiveness of counsel. If the failure of competent counsel to anticipate a new argument which some counsel do anticipate is "cause", then *Wainwright* returns to the "deliberate bypass standard" of *Fay v. Noia, supra*.

To justify the use of the *"Hankerson"* rule, this Court need look no further than the notion of finality in our criminal system. Under either of the major rationales of the appellate court below the result is devastating. Potentially the decision affects all Ohio defendants relying on affirmative defenses between 1974-1976. See also: *United States v. Frady*, 636 F. 2d 506 (D.C. Cir. 1980), *cert. pending*, No. 80-1595.

The holding of the appellate court below is even more disturbing in the sense that *Robinson* is a state statutory and not a constitutional law decision. Isaac never asserted that the Ohio Supreme Court needed to make *Robinson* retroactive and petitioners would adopt such view:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court though later overruled, are law nonetheless for intermediate transactions.

Great Northern R. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358, 364 (1932); See also: *Wainwright v. Stone*, 414 U.S. 21 (1973).[9] Moreover, if as asserted on the merits, *Robinson* was not constitutionally mandated for a fair trial, Ohio could have overruled *Robinson* when faced with the deluge. Rather than taking either of these extremes, Ohio chose to make *Robinson* retroactive to those who had preserved the error and to await the inevitable legislative amendment of O.R.C. Section 2901.05A. In drawing such line, there was nothing irrational or arbitrary in giving the benefit of *Robinson* to those who had earned it. *Dobbert v. Florida*, 432 U.S. 282 (1977); *Estelle v. Dorough*, 420 U.S. 534 (1975); *Schick v. Reed*, 419 U.S. 256 (1974); *Warden v. Marrero*, 417 U.S. 653 (1974).

D. WAIVER AS A FEDERAL QUESTION

Judge Celebreeze in his panel concurrence (A33) took a slightly different tact on the question of waiver. His view was that the issue on the merits was so intertwined with the fundamental reliability of fact finding as to override any state procedural concerns. (A34). Such view is an extension of *Henry v. Mississippi*, 379 U.S. 443 (1965) that in certain situations deference to state procedural rules should not be accorded. Petitioners do not dispute that waiver is a federal constitutional question. Nor do petitioners dispute that state procedural rules which serve no legitimate purpose may be overriden. In *Wainwright v. Sykes, supra* however, this Court stated the test as "cause *and* prejudice". Emphasis supplied. See *Tyler v. Phelps, supra*. Judge Celebreeze's test merges the two criteria—

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[9]The panel stated that it expressed no opinion on whether Ohio needed to make *Robinson* retroactive as a matter of federal constitutional law, (A26). Normally, the retroactivity of a new statutory interpretation is a matter of policy. *Halliday v. United States*, 394 U.S. 831 (1969), *Chevron Oil Co. V. Huson*, 404 U.S. 97 (1971).

if prejudice is shown, cause is irrelevant. Moreoever state contemporaneous objection rules are concededly legitimate, useful and desirable procedural tools. While thus phrased differently, Judge Celebreeze's test, like the en banc plurality, and Judge Jones reliance on the panel majority contravenes *Wainwright*.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

A. MISCONSTRUCTION OF STATE LAW

In *Brady v. Maryland*, 373 U.S. 83, 90 (1963), this Court aptly stated:

> We usually walk on treacherous ground when we explore state law [footnote omitted] for state courts, state agencies, and state legislatures are its final expositors under our federal regime.

See also: *Tennon v. Ricketts*, 574 F. 1243 (5th Cir. 1978), *cert. denied*, 439 U.S. 1091; *United States ex rel Almeida v. Rundle*, 255 F. Supp. 936 (E.D. Pa.), *aff'd.*, 383 F. 2d 421 (3rd Cir. 1967), *cert. denied*, 393 U.S. 863 (1964). By raising a question of error of state law to constitutional dimensions, the appellate court below failed to heed this admonition.

It must be noted that *Robinson* did not purport to be anything other than a state court decision construing state statutory law:

> Because our decision in this case is based upon Ohio statutory law, we need not consider whether *Mullaney* might constitutionally mandate a similar result.

Robinson, supra, at 113 n. 11. Thus while petitioners must admit that the instructions given were contrary to the subsequently announced decision in *Robinson*, nothing in such admission requires the conclusion that federal due process has similarly been violated. Not every error of state law is a violation of the constitution. *Beck v. Washington*, 369 U.S. 541 (1962); *Wainwright v. Stone, supra; Snowden v. Hughes*, 321

U.S. 1 (1943); *Milwaukee Electric Ry. Co. v. Wisconsin*, 252 U.S. 100 (1920); see also: *Bishop v. Mazurkiewicz, 634 F. 2d* 724 (3rd Cir. 1980).

Notwithstanding that *Robinson* was a state statutory decision, the appellate court found that *Robinson* itself created a federal due process question under *Mullaney*. This is perhaps the ultimate irony; *Robinson* was concerned with avoiding a potential "*Mullaney*" problem. In reaching this result, however the appellate court below found that *Robinson* created a new and functional element of the crime—"the absence of the affirmative defense":

> As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes as the states have chosen to define them beyond a reasonable doubt. We further conclude that once a state assumes the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume.

(A9). In the process, the appellate court below misconstrued Ohio law.

Self defense has traditionally been an affirmative defense under the law of Ohio. It is a device of confession and avoidance and, as such, the existence or non existence of the defense is wholly collateral to the elements of the crime:

> This court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses". As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but rather, they represent a substantive or independent matter" which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true". Among those defenses in Ohio are self defense, duress, insanity, and intoxication.

State v. Poole, 33 Ohio St. 2d 18, 19 (1973); see also: *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). Nothing in the enactment of O.R.C. Section 2901.05 in 1974 changed the characterization of self defense as an affirmative defense. While *Robinson* was intended to lessen the defendant's obligation to raise the

affirmative defense, it still remains collateral to the question of whether the elements of the crime have been proved. Ohio still labels self defense as an affirmative defense (O.R.C. Section 2901.05), the jury need not be instructed on a specific duty by the prosecution to prove the absence of self defense [*State v. Abner*, 55 Ohio St. 2d 251 (1978)], some burden remains on the defendant to raise the issue, failing which, the issue does not go to the jury [*State v. Robbins*, 58 Ohio St. 2d 74 (1979); *State v. Melchior*, 56 Ohio St. 2d 15 (1978)], and where the defense presents evidence that negates an element of the crime, such evidence may be inconsistent with the plea of self defense [*State v. Rogers, supra; State v. Champion*, 109 Ohio St. 28 (1924)]. To say that the absence of self defense, even after *Robinson*, relates to an element of the crime rather than a collateral matter would be a fundamental contradiction under Ohio law. *State v. Gall*, 65 Ohio App. 2d 57 (CA Greene 1980).

That the appellate court chose to rewrite Ohio law is most clearly seen by their failure to even cite *State v. Abner, supra*. In *Abner*, the Ohio Supreme Court rejected the contention that a defendant under *Robinson* was entitled to a specific instruction on the state's burden to disprove the absence of self defense. By doing so, the Ohio Supreme Court reaffirmed that even under *Robinson* self defense is an affirmative defense, not an element of the crime. As found by Judge Lively in dissent:

> The jury does not reach a defense of self defense until it finds that all elements of an offense have been established beyond a reasonable doubt.

(A18).

B. SELF DEFENSE

The proposition that *Robinson* is a state statutory redefinition with respect to a collateral matter is important. In finding a violation on the merits, the appellate court assumed that in any claim involving the shifting of the burden of proof, "prejudice" would be presumed:

> An error in the allocation of that burden, here shifting from the state its burden of proving absence of self defense beyond a reasonable doubt to the defendant to prove self defense by a preponderance of the evidence profoundly affects the basic fairness of a defendant's trial.

(A6). But CF *Hooper v. Perini*, 641 F. 2d 445 (6th Cir. 1981). Yet, a central tenet of petitioners' position is that *Robinson* is

not constitutionally required for a fair trial. Assuming the validity of such tenet, while an error of state law may have occurred, it did not undermine the fundamental fairness of the trial. *Robinson* may have worked a benefit on behalf of a criminal defendant. The question in these cases turns however not on whether some benefit would otherwise be withheld but on whether such benefit is constitutionally required. *Gosa v. Mayden*, 413 U.S. 665, 680 (1973); *United States v. Black*, 480 F. 2d 504 (6th Cir. 1973); *United States v. Peterson*, 611 F. 2d 1313 (10th Cir. 1979).

The starting point of analysis is *Mullaney v. Wilbur, supra*. In *Mullaney*, this Court held unconstitutional a Maine law placing on the defendant the burden of proving that, in killing a person, he had acted in the heat of passion. This court seemingly suggested that a state could not, consistent with due process, shift to the defendant the burden of demonstrating any fact which decreased the degree of culpability. Under this interpretation of *Mullaney*, the prosecution would be required to prove beyond a reasonable doubt the absence of any affirmative defense raised by the defendant, regardless of whether that affirmative defense negated an element of the crime.

Such a broad interpretation of *Mullaney* was rejected in *Patterson v. New York*, 432 U.S. 197 (1977). In that decision, this Court upheld the validity of a New York statute allocating to the defendant the burden of proving that he had killed a person while he was under the influence of extreme emotional distress:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Patterson, supra at 210. Following *Patterson*, it is simply not

fundamentally unfair to place the burden of proof of self defense on the defendant.

Judge Edwards, in concurrence in *Isaac* (A10) and Judge Merritt, in dissent (A23), adopted the view that self defense is irreconcilable with criminal intent and therefore due process is always violated by placing the burden of self defense on the defendant. Under *Patterson*, this is assuredly not the case:

> Allowing a State to treat self defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality.

Carter v. Jago, 637 F. 2d 449, 457 N. 6 (6th Cir. 1980)(petition for rehearing en banc pending)(A 69,82)[10]. See also: *Hankerson v. North Carolina, supra* at 245. (Blackmun, J. and Burger, C.J., concurring). An example is Bell. Bell was convicted of murder, in violation of O.R.C. Section 2903.02. As defined by the statute, the crime is "no person shall purposely cause the death of another". To claim self defense is not inconsistent with any of the elements of this crime. A person may act purposefully and justifiably at the same time.

In *Carter v. Jago, supra*, the same appellate court as decided the cases sought to be reviewed herein held in a pre 1974 trial, that the traditional common law instruction on the affirmative defense of self defense does not impermissably shift the burden of proof on the elements of crime. See also: *Krzeminski v. Perini, supra* at 124:

> *Patterson* makes it clear that so long as the jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self defense, extreme emotional disturbance or insanity upon the defendant.

This holding creates the bottom line analysis that a trial in Ohio in 1973 with the same instruction as given in these cases is constitutionally fair, whereas in these cases the instruction is constitutionally unfair. That the time parameters of the trial should make a difference in constitutional terms underscores the error of the court below.

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[10]Following the legislative amendment in 1978 of O.R.C. Section 2901.05A, the Ohio Courts have upheld the constitutionality of the traditional instruction. *State v. Howze*, 66 Ohio App. 2d 41 (CA Summit 1979).

In *Carter*, the appellate court correctly analyzed the dichotomy between this Court's decisions in *Mullaney, supra* and *Patterson v. New York, supra*. In *Mullaney*, the state had presumed the very factor—malice—which made a distinction between degrees of culpability as defined by the state law whereas in *Patterson*, the state bore the burden of proof as to each element of the crime; nothing required for a finding of criminal liability was presumed. See also: *Rivera v. Delaware*, 429 U.S. 877 (1976); *State v. Frost*, 57 Ohio St. 2d 121 (1979). The traditional instruction that failure of the affirmative defense did not relieve the state of its burden of proof as to the elements of the crime drew the same dichotomy. No element of the crime was presumed.

To be sure, changing the burden of proof on an affirmative defense may in some instances have an affect on the outcome of the trial. Because the change here however, dealt with a collateral matter to the elements of crime and was not of constitutional origin, a "presumed" prejudice test is inappropriate. *CF Hooper v. Perini, supra*. In rejecting that a *Robinson* error was "plain error" Ohio took the view that the defendant must show actual prejudice, *i.e.* that the result of his trial would have been different. *State v. Long, supra*. As applied to this error of state law, the prejudice component of *Wainwright* should be similarly construed. By failing to distinguish between changing the burden of proof on an affirmative defense and creating a new element of the crime, the appellate court committed error.

CONCLUSION

The decisions of the Courts below are erroneous as to both the "cause" and "prejudice" components of *Wainwright v. Sykes, supra*. As such, a reversal in each case is required.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
COUNSEL OF RECORD

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Brief of Petitioners have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____ day of June, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
COUNSEL OF RECORD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, SUPERINTENDENT
CHILLICOTHE CORRECTIONAL INSTITUTE

Petitioner,

vs.

LINCOLN ISAAC,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT LINCOLN ISAAC

JAMES R. KINGSLEY
Court-appointed
157 West Main Street
Circleville, Ohio 43113
(614) 477-2546

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

Question I:

DOES THE *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977), CAUSE/PREJUDICE REQUIREMENT BAR FEDERAL HABEAS CORPUS REVIEW OF THE DENIAL OF A NEW TRIAL BASED UPON A RETROACTIVE CHANGE IN THE LAW WHEN THE DEFENDANT FAILS TO OBJECT AT TRIAL?

Question II:

ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF CRIMINAL LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED UPON A STATE PROCEDURAL RULE?

Question III:

ONCE THE HIGHEST COURT OF THE STATE, IN ITS SYLLABUS, DECLARES A CHANGE OF LAW TO BE RETROACTIVE, CAN IT SELECTIVELY ENFORCE A PROCEDURAL "CONTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN A DEFENDANT'S TRIAL RECORD DEMONSTRATES A CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

Question IV:

IT IS A VIOLATION OF DUE PROCESS OF LAW FOR THE HIGHEST COURT OF A STATE NOT TO FIND "PLAIN ERROR" AND TO REFUSE TO ORDER A NEW TRIAL TO CASES PENDING ON REVIEW WHEN THE COURT CHANGES THE LAW IN A CONSTITUTIONALLY PROTECTED AREA AND DECLARES THE CHANGE TO BE RETROACTIVE?

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STATEMENT OF CASE

On April 9, 1975, Lincoln Isaac went unannounced to a bar at 2 a.m. to attempt to pick up Donna Shobe, his ex-wife and the barmaid, to take her to his home as he had done many times in the past.

Upon his arrival, he was met by Bernard Engle, her boyfriend, who was also there to pick her up. Isaac claimed Engle, without provocation, "sucker punched" him first from behind and he acted in self-defense. Engle suffered severe injuries. The only witnesses to the first punch were Isaac and Engle. Mrs. Shobe admitted, upon cross-examination, that she did not see the beginning of the fight (trial transcript at page 44.)

Isaac, on May 30, 1975, was indicted for the offense of Felonious Assault, in that he "unlawfully did knowingly cause serious physical harm to Bernard Engle contrary to and in violation of Section 2903.11 of the Ohio Revised Code . . .".

At trial, on September 16, 1975, Isaac relied solely on the affirmative defense on self-defense. Trial counsel indicated this on opening statement and it was argued in closing argument. The trial court instructed the jury that the defendant had to prove self-defense by a preponderance of the evidence. Isaac did not object to this portion of the jury charge.

The defendant was convicted of the lesser included offense of Aggravated Assault. He was sentenced on September 16, 1975, to the Ohio Penitentiary for a term of six months to five years. Isaac timely appealed to the Court of Appeals for Pickaway County, Fourth Appellate District. While his appeal was pending, the Supreme Court of Ohio, on July 21, 1976, decided the case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976), which case clearly stated that the traditional defense of self-defense no longer placed the burden of proof upon the defendant, but placed the burden on the State of Ohio to disprove the defense, once the defendant raised it.

Defendant immediately briefed to the Fourth District Court of Appeals the case of *Robinson, supra,* claiming this case entitled him to a new trial since the jury had been improperly instructed.

The Court of Appeals affirmed the trial court stating Ohio Criminal Rule 30 barred relief because counsel did not timely object to the jury charge.

Issac timely appealed to the Supreme Court of Ohio alleging: (1) that *Robinson* should be applied retroactively, (2) that his failure to object constitute plain error under Ohio Criminal Rule 52, (3) that *O'Connor v. Ohio,* 385 U.S. 92 (1966), held Criminal Rule 30 could not bar review of a federal constitutional right, and (4) that *Mullaney v. Wilbur,* 421 U.S. 684 (1975), required a new trial on federal due process grounds.

On July 20, 1977, the Supreme Court of Ohio dismissed Isaac's appeal for a lack of substantial constitutional question, and on the same day decided the cases of *State v. Humphries* and *State v. Myer,* 51 Ohio St. 2d 95 (1977), which held *Robinson* was to be treated retroactively to January 1, 1974. The Supreme Court of Ohio denied Humphries a new trial because he failed to object at his jury trial to the charge, but granted a new trial to Myer because she was tried solely to the court.

On May 3, 1978, Isaac filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Ohio, Eastern Division, alleging he was entitled to relief base upon *Robinson, Humphries, Mullaney,* and *Hankerson v. North Carolina,* 432 U.S. 233. The writ was denied based upon *Wainwright v. Sykes,* 433 U.S. 72, due to counsel's failure to object.

Isaac timely appealed to the U.S. Court of Appeals for the Sixth Circuit, which granted the writ of habeas corpus on February 8, 1980. An en banc rehearing was allowed, and the panel affirmed the issuance of the writ on December 12, 1980.

On April 20, 1981, this honorable Court granted certiorari.

SUMMARY OF ARGUMENT

Who carries the burden of proof in a state criminal trial is a matter of federal due process of law. Within limits, a state may define what an "element" of a crime is, provided the state prove it beyond a reasonable doubt. A state may also provide for who shall bear the burden of persuasion of an affirmative defense.

Federal due process of law requires that the jury be correctly instructed as to the law of the case (especially as to the burden of proof) so it can properly perform its function of ascertaining the truth by applying the facts to the law given. If the law of the case is substantially changed retroactively, a new trial is necessary in order to have the truth-finding process remain intact and to maintain basic fairness and the integrity of the judicial process.

The *Wainwright v. Sykes*, 433 U.S. 72 (1977), cause/prejudice requirement does not bar respondent's review in habeas corpus of his claim the jury instructions given in his case violated federal due process of law. Respondent's case is controlled by *Hankerson v. North Carolina*, 432 U.S. 233 (1977). In both cases, the defendants failed to object to erroneous jury instructions at trial and both raised *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to the Supreme Court of the state. When *Hankerson* declared *Mullaney v. Wilbur* to be retroactive, *Isaac* was still on direct appeal to the state supreme court. Respondent is entitled to the benefit of a federal principle declared to be retroactive and no state procedural requirement can bar him its benefit.

Review of a retroactive change in the law is not controlled by cause/prejudice because deference to a contemporaneous objection requirement presupposes the existence of a legal principle that could be objected to.

If a retroactive decision is subject to *Wainwright v. Sykes* cause/prejudice, then respondent showed cause in that the

change in the law was not foreseeable, or if an objection had been made, it would have been a futile act under the law of the case and principle of *stare decisis*.

Respondent showed prejudice because the erroneous jury instruction went to the heart of the fact-finding process. The defendant was required to prove something when he, in fact, had to prove nothing.

Once a state declares a principle of law to be retroactive, how it applies the change is a matter of federal due process of law. Ohio arbitrarily applied its contemporaneous objection rule to deny respondent a new trial when it declared the law of self-defense to be in error, prejudicial and retroactive, but denied new trials to defendants who were found guilty by misinformed juries and granted new trials to defendants who were found guilty by misinformed judges for the sole reason Criminal Rule 30 applies to jury trials only. In both instances, the trier of fact applied the wrong law.

Certain errors so affect the fact-finding process that a new trial is necessary regardless of compliance with procedure. Plain error is a separate vehicle for review and is not subject to procedural bars. Failure of a state to recognize plain error in constitutionally protected areas when the error affected the outcome of the case, violates due process of law and entitles a defendant to federal habeas corpus relief.

ARGUMENT OF LINCOLN ISAAC

Question I:

DOES THE WAINWRIGHT v. SYKES, 433 U.S. 72 (1977), CAUSE/PREJUDICE REQUIREMENT BAR FEDERAL HABEAS CORPUS REVIEW OF THE DENIAL OF A NEW TRIAL BASED UPON A RETROACTIVE CHANGE IN THE LAW WHEN THE DEFENDANT FAILS TO OBJECT AT TRIAL?

A. Purpose of Ohio Criminal Rule 30

In Ohio the syllabus of the case is law and controls over the opinion of the court, unless *per curium*. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437. See also, *Hass v. State*, 103 Ohio St. 1 (1903)

On the same day Isaac's appeal was denied, the Supreme Court of Ohio decided *State v. Williams*, 51 Ohio St. 2d 112 (1977), vacated in part, *sub nom, Williams v. Ohio*, 439 U.S. 955.

Paragraph one of the syllabus states:

> An appelate court need not consider an error which the party complaining of the trail court's judgment could have called, but did not call, to the trial court's attention at a trial when such error could have been avoided or corrected by the trial court (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)

The court further stated in its opinion at page 117:

> . . . "Any other rule," this court stated in *State v. Driscoll* (1922), 106 Ohio St. 33, 138 NE 376, at 39, "would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error." See Ohio Criminal Rule 30.
>
> The fact that appelant raises a federal constitutional question does not change this court's conclusion. It is an established rule of long standing in this state that a criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below . . .

Williams, at page 117, quotes *Driscoll* from page 38, which in turn quotes *State v. McCoy*, 88 Ohio st. at page 450 (1922). *Driscoll* further stated at page 39:

> It should be added that the error complained of is purely technical, that it could not have prejudiced the accused, and that a full instruction on that point would not have caused the jury to reach a different ver dict.

State v. McCoy states (quoted also in *Driscoll*):

> When the charge given is free from prejudicial error, but fails to cover all the questions involved in the case, such failure is not grounds for reversal unless it was called to the attention of the court and further instruction requested and refused, *provided the jury is not misled by the charge as given*. (emphasis added)

Ohio follows the principle of *stare decisis*. At the time of Isaac's trial on September 9, 1975, the cases of *Silvus v. State*, 22 Ohio St. 90 (1871), *State v. French*, 171 Ohio St. 501 (1961), and *State v. Seliskar*, 35 Ohio St. 2d 95 (1973), were controlling. The trial court would not have ruled differently even had the defendant objected. *Ames v. Consolidated Iron-Steel Mfg. Co.*, 9 Ohio L Abs. 52 (Cuyahoga Cty 1930), *Shoemaker v. City of Cincinnati*, 68 Ohio St. at page 612 (1903), *Tax Commissioner v. Castings Co.*, 111 Ohio St. at page 126 (1974), *Kearny v. Buttles*, 1 Ohio st. at page 367 (1853).

Therefore, Criminal Rule 30 *presupposes* the existence of a legal principle applicable to the proceedings. *Meyers v. State of Washington*, 646 F 2d at 360 (1981). The duty of trial counsel is not to make new law, but to diligently find existing law and provide it to the court so it has the opportunity to correctly charge the jury as to the law to be applied in the case.

Errors in jury instructions not brought to the court's attention that were technical and did not mislead the jury are waived. Errors that were not technical and did mislead the jury are not to be disregarded.

B. "Cause" Shown

Ohio, since *Silvus v. The State*, 22 Ohio St. 90 (1871), has adhered to the rule that the defendant had to prove self-defense by a preponderance of the evidence. The *Silvus* Court specifically rejected the contention that the state had to disprove self-defense and approved a presumption in a homicide case that the defendant had not acted in self-defense. See also, *State v. French*, 171 Ohio St. 501 (1961), *State v. Seliskar*, 35 Ohio St. 2d 95 (1973).

On January 1, 1974, Ohio adopted a new criminal code. Ohio Revised Code 2901.05(A) stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affimative defense is upon the accused.

Accompanying the new criminal code was a transition table that did not reflect a change in the prior law was intended. See Amended Substitute House Bill 511, Reverse Disposition Table. Committee notes following that section did not reveal any intended change. The author's notes included in Volume 4, *Ohio Jury Instructions*, Section 409.60, from which Isaac's charge was taken, did not reflect a change in the law was intended. Leading treatises perceived no change. 1 Anderson's *Ohio Criminal Practice and Procedure*, para 52.15 (1975 ed.), 1 O. Schroder and L. Katz, *Ohio Criminal Rule Practice*, title 29 at 14 (1974 ed.). Compare: *Baldwin's Ohio Criminal Practice Manual* (6th ed. 1969), text section para 23.5. No reported decision reflected a change. The appellate decision of *State v. Robinson*, 48 Ohio App. 2d 197, was not reported until after the Supreme Court decision in that case was reported. The unreported appellate decision was in conflict with *State v. Rogers*, 43 Ohio St. 2d 28 (July 2, 1975), decided two months before

Isaac's trial (and after *Mullaney* on June 9, 1975), wherein the Supreme Court of Ohio stated at pages 30-31:

> Inasmuch as self-defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* (1973), 35 Ohio St. 2d 95, 96 . . .)
>
> . . . the defense of using reasonable force to effect a citizen arrest . . . is . . . an affirmative defense (RC 2901.05 (C) (2)) which places the burden of going forward with the evidence upon the accused (RC 2901.05(A)) *to prove that issue by a preponderance of the evidence* . . . . (emphasis added)

It is a safe to state few attorneys or judges foresaw the dramatic change. As Isaac's trial counsel, this writer never considered such a change would occur. The law of self-defense in Ohio was carefully researched. Proposed jury instructions on when self-defense could be asserted, i.e., force v. force, and not only when in fear of death or great bodily harm, were submitted to the court but refused. This was *not* a case of perceiving a change in the law in deeming an objection to it to be futile. No attorney would want to prove his client acted in self-defense when, upon a simple request to the court, the state could be made to disprove that his client did not have such a right.

It is evident, or *stare decisis* grounds, that an objection, if made, would have been futile and as such would excuse failure to object. *Smith v. Estelle*, 602 F 2d at page 708, n. 19, and *Estelle v. Smith*, 49 U.S. L.W. at 4493, n. 12 (1981). In the case of *State v. Slone*, 45 Ohio App. 2d 24 (Franklin Cty 1975), trial counsel in Franklin County, Ohio, requested the trial judge to charge the jury the state had to disprove self-defense in accordance with the Franklin County unreported decision of *State v. Mathews*, No. 74-AP-428, and the trial judge refused to do so and read the standard instructions. *Mathews* was the basis for *Robinson* in 1976.

Petitioner's sole basis to defeat "cause", is to allege respondent's counsel could have, or should have, anticipated the change in the law; objected to the charge and forged the new law himself in order to reap its benefits. The state can not urge that *Mullaney v. Wilbur*, 421 U. S. 684 (1975), decided three months before Isaac's trial, somehow put respondent's counsel on notice that the Supreme Court of Ohio would dramatically change the law of affirmative defenses. *Mullaney was law one month before State v. Rogers* was decided.

Mullaney did not clearly speak to all affirmative defenses. *Leland v. Oregon*, k343 U.S. 790, was not overruled. The jury in Isaac was not charged with an improper presumption.

Counsel read *Mullaney* as this Court did in *Patterson v. New York*, 432 U.S. 197 (1977). Presumptions assisting proof of an element to be proven by the state are not permissable. Since *Patterson* expressly states *Mullaney* never stood for what petitioner wants it to stand for, Isaac can not be held to foresee a change in Ohio law based upon it.

The Supreme Court of Ohio refused to reach *Mullaney* rationale, but decided *Robinson* on state grounds. Therefore, only the enactment of Ohio revised Code 2901.05(A) would have, or should have, put counsel on notice of the impending *Robinson* change. As previously discussed, no state references noted any intended change.

Stating *Robinson* was foreseeable, places a higher burden of diligence on trial counsel than upon the highest Court of the State of Ohio, who also failed to perceive the change three months before Isaac's trial. Is trial counsel to be held to a standard of omnipotency?

The change was not foresseable and therefore, failure to object to the jury instructions that were in accord with the law of the case is excused. *Lee v. Missouri*, 439 U.S. 461 (1979), *Canary v. Bland*, 583 F 2d 887 (6th Cir. 1978), *U.S. v. Frady*,

636 F 2d 506 (D.C. 1980) at n. 17, *Meyers v. State of Washington*, 646 F 2d 355 (9th Cir. 1981), concurring opinion of Judge Locher, *State v. Humphries*, 51 Ohio St. 2d at page 110 (1977), *O'Connor v. State of Ohio*, 385 U.S. 92 (1966).

If failure to foresee a change in the law, and a second failure to foresee it would be held to be retroactive is not "cause", then there can never be a review of how a state applies its retroactive law.

C. Prejudice Shown

Isaac's entire defense was he was justified in his actions. Trial counsel hammered away at self-defense in opening, closing, and upon direct and cross examinations. Trial counsel attempted to show the victim was larger in physical size than defendant; that the altercation took place nearer the defendant's car than the victim's to show that the victim had to approach the defendant; that the defendant stopped hitting the victim when he felt the victim no longer was the aggressor, and finally, that there was only disputed evidence that the defendant threw the first punch.

The State of Ohio has recognized that for the period of time from January 1, 1974 through November 1, 1978, that if a jury was instructed that a defendant had the burden of proving an affirmative defense, that such jury instruction constitutes prejudicial error, and if objected to, the defendant is entitled to have the jury instructed that he had no such burden. *State v. Jones*, 67 Ohio St. 2d 244 (1981). Other courts have presumed prejudice under similar circumstances. *Meyers v. State of Washington*, 646 F 2d at 363 (1981), *Rachel v. Bordenkircher, 590 F 2d 200 (6th Cir. 1979)*.

D. Cause/Prejudice Not Applicable

The legal principle of retroactivity is not controlled by cause/prejudice. Deference to a procedural rule requiring ob-

jection presupposes an existing legal principle that could be objected to. The legal principle was not objectionable until after it was changed. If counsel must object "to preserve the record" hoping a change in the law may occur, and such change may be declared retroactive, then at trial counsel must object to *everything*. This disruption of the trial process can not be tolerated. See dissent in *Cole v. Stevenson*, 620 F 2d 1055, 1069 (4th Cir. 1980). It would require counsel to overload his appellate briefs with nonmeritorious issues, *Meyers v. State of Washington*, 646 F 2d at 360 (1981), which could dilute the effectiveness of his meritorious claims. *Cole v. Stevenson, supra*, n. 25 at 1071.

E. Wainwright v. Sykes in Perspective

The federal courts have the power in habeas corpus to review errors in state criminal trials that affect federal constitutional rights. Deference to state procedure is a matter of comity.

Fay v. Noia, 372 U.S. 391 (1963), was the test in effect at the time of defendant's trial on September 9, 1975. *Robinson* was decided July 21, 1976. *Wainwright v. Sykes* was decided June 23, 1977. Under *Fay v. Nois*, defendant would be entitled to review because failure to object was not an intentional bypass.

Petitioner claims the federal courts can not review an error even if the error is a violation of a constitutional right and it is found to be prejudicial, unless trial counsel objected. Petitioner places the entire burden of an error-free trial on trial counsel. The role of the trial judge to preside over an error-free trial is nullified. *State v. Gideons*, 52 Ohio App. 2d at page 78 (1977).

Adherence to petitioner's contention is not to give deference to state procedure, but is to become subservient to it. The federal courts no longer would be the final arbitrator of federal constitutional rights.

Before such deference is given, surely the federal courts can examine state procedure to insure it serves both a legitimate state

and federal interest. As discussed in Question IV, Ohio has permitted Criminal Rule 30 to emasculate Criminal Rule 52 to a point where Ohio seems to believe, so long as counsel did not object, the trial had to have been error-free.

Errors occur at trial for only three reasons — the trial counsel goofed, the judge did not catch him, or the law was retroactively changed.

It is not error for a defendant to relinguish a known right, *Fay v. Noia*, 372 U.S. 391 (1963), and such decision should not be reviewable.

When a defendant unknowingly relinquishes a right through the failure of his counsel to act, a more difficult question arises.

One can not reconcile failure to object with competent counsel. If respondent's counsel did not object to the charge, and he should have done so, he is incompetent and cause has been shown.

In order for "cause" to remain valid, this Court must find it does not include incompetent counsel. That is, the default of counsel is imputed to the client who can not complain. Finality becomes the polestar and not fairness.

If this court believes, as does respondent, that it is unfair to impute all acts of counsel to his client, especially when many times a defendant can not choose his counsel, then *Wainwright v. Sykes* must be reexamined.

State procedural rules do not assist in the fact-finding process. They merely expedite the process and add finality to it.

Errors in a trial are not recognized by federal law have always remained subject to a procedural bar for not raising them.

Deference to the states can be observed by requiring errors that do affect a federal constitutional right to be presented to the state courts first for their opportunity to pass on the claims.

Does this mean that the federal courts will then review all state decisions? If the state court refuses to pass on the federal

claim without a valid reason, yes. Adherence to a contemporaneous objection rule inspite of plain error would cause review.

The state should be required to realistically recognize and examine plain errors in light of *Chapman v. California*, 386 U.S. 18 (1967). In most instances, that will end the matter. *State, ex rel Corrigan v. White*, 46 Ohio St. 2d 29 (1976), *State v. Woolery*, 46 Ohio St. 2d 316 (1976), *State v. Lockett*, 49 Ohio st. 2d 48 (1976), *State v. Weind*, 50 Ohio St. 2d 24 (1977), *State v. Black*, 54 Ohio St. 2d 304 (1978), *State v. Faulkner*, 56 Ohio St. 2d 42 (1978), *State v. Clayton*, 62 Ohio st. 2d 45 (1980), *State v. Adams*, 62 Ohio St. 2d 151 (1980).

Many defendants want only their day in court. An adverse decision based on sound judicial reasoning in generally not appealed.

Question II:

ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF CRIMINAL LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASE UPON A STATE PROCEDURAL RULE?

A. Hankerson v. North Carolina is Controlling

Burden of proof in a state criminal case is a matter of federal due process of law. *In re Winship*, 397 U.S. 358 (1970). There are limits beyond which the states cannot go. *Patterson v. New York*, 432 U.S. 197 (1977), *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Through the supremacy clause of the United States Constitution, a decision of the Supreme Court of the United States binds the states. Therefore,a decision by the Supreme Court of the United States that a federal constitutional right is to be given

retroactive application cannot be defeated by state procedural rule.

Retroactive is not constitutionally required. A change in the law may be declared: (1) prospective only (even the person who raised the issue and won does not get its benefits), (2) partially retroactive (applies to cases still on review or relates back to a specified time), or (3) fully retroactive (all who can show on the record that the ruling applies to them receive the benefit of the change, i.e., a new trial). *Linkletter v. Walker*, 381 U.S. 618 (1965).

Hankerson v. North Carolina, 432 U.S. 233 (1977), declared *Mullaney v. Wilbur* to be retroactive to at least cases pending on appeal. Petitioner Hankerson got a new trial. The facts on *Hankerson* control the facts of *Isaac*.

Johnny Hankerson raised the issue of self-defense at trial. The jury was told he had to satisfy them he was justified in using force. Lincoln Isaac raised the issue of self-defense at trial. The jury was told he had to prove, by a preponderance of the evidence, that he was justified in using force. Neither defendant objected at trial to the instructions.

Hankerson, for the first time, objected to the instructions on direct appeal to the Supreme Court of North Carolina based upon *Mullaney* reasoning. Isaac raised the *Robinson* issue in the Fourth District Court of Appeals for Pickaway County, Ohio, and also raised the *Mullaney* issue to the Supreme Court of Ohio. The Supreme Court of North Carolina considered the validity of the instructions, but refused to apply *Mullaney* retroactively. The Supreme Court of Ohio considered the validity of the instructions in *Humphries* and found the change to be retroactive, but denied Isaac's motion to certify the record for want of a substantial constitutional question. This court reversed and Johnny Hankerson got a new trial.

Footnote 8 in *Hankerson v. North Carolina*, 432 U.S. 233 at page (1977), has caused great confusion. Did the majority opinion intend to declare *Mullaney* fully retroactive and then take away the benefit of the change by allowing a state procedural contemporaneous objection rule to bar retrial? If so, then the retroactive language is illusory. If so, the Court has permitted the question of retrial to hinge solely upon whether or not the several states had a procedural bar.

The disharmony of the opinions of the Justices of this Court in regard to whom a retroactive decision should benefit, should not bar Lincoln Isaac to benefit of the retroactivity declared in *Hankerson*.

As a matter of federal constitutional law, Hankerson's jury was misinstructed. Therefore, as a matter of federal constitutional law, Isaac's jury was also misinstructed. The fact the Supreme Court of Ohio refused to reach the constitutional grounds raised by Isaac, does not mean his federal rights were not violated. *Hankerson* was decided June 17, 1977. Isaac's constitutional question was dismissed July 29, 1977. The Supreme Court of Ohio knew *Mullaney v. Wilbur* was retroactive when it dismissed Isaac's appeal. It knew Johnny Hankerson got a new trial, and it knew at least the cases pending on appeal were to be benefited.

B. Retroactivity and Habeas Corpus

One cannot deny to Isaac the benefit of *Hankerson* because he chose collateral review through habeas corpus as opposed to direct review to this Court. Many times cost, proximity to the District Court, convenience of counsel, and a required review dictate habeas corpus as a better procedure. If direct appeal is required, then this Court's docket will be tolerably overburdened.

Distinguishing between collateral and direct review as a test for who obtains the benefits of retroactivity should not be adopted. Before declaring a principle of law fully retroactive, the Court will consider its impact on justice. If declared to be fully retroactive, the benefit applies to all defendants who can prove they raised the issue in their trial record and it was material. It makes no difference when their decisions became "final".

If a decision is declared to be partially retroactive, then the benefits of retroactivity must be allowed to at least the one who argued and won the point as a reward for his diligence. One must assume that the law that was changed in the interest of society improved it and such an incentive is desirable. All others who raised the point in the deciding court, but were not chosen as a vehicle for decision, and all others who raised the issue in any lower courts which were still pending for review, must also benefit. They too have been diligent, and nonjudicial factors played a part on who got to be the reported case, i.e., time to prepare the transcript, the time it took to decide the issue and the arbitrary choice of which case was chosen for decision.

It should make no difference in which court the issue was raised, so long as that issue was pending within the system at the time the law was declared retroactive. This could be in the trial, appellate or Supreme Court of the state, or in the Federal District Court or Federal Appellate Court in habeas corpus, or on direct appeal to the Supreme Court of the United States.

If a defendant failed to grasp, as applicable to his case, the change in the law not yet declared to be retroactive, and he failed to raise it in his pending appeal or by filing a writ of habeas corpus, then he is barred from obtaining relief because of his nonaction. Therefore, cases in which a defendant has been paroled, in all probability, would not be affected. The interests of finality have been addressed since only those defen-

dants who raised the issue of retroactivity after the decision that changed the law would benefit. *Lee v. Missouri*, 439 U.S. 461 (1979). The distinction is drawn as a result of a defendant's diligence and he can not complain.

If *Hankerson* states only cases on direct review are to be given the benefit of the retroactive change, then Isaac should also benefit since he was on direct review to the Supreme Court of Ohio when they announced its decision in *Humphries*, which was after *Hankerson*.

Question III:

ONCE THE HIGHEST COURT OF THE STATE, IN ITS SYLLABUS, DECLARES A CHANGE OF LAW TO BE RETROACTIVE, CAN IT SELECTIVELY ENFORCE A PROCEDURAL "CONTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN A DEFENDANT'S TRIAL RECORD DEMONSTRATES A CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

A. Ohio's State Law of Retroactivity

The State of Ohio, in the case of *State v Robinson*, 47 Ohio St. 2d 103 (1976), was careful to couch its decision on state interpretation of a state statute. Thus, the Ohio Supreme Court attempted to avoid the mandate set forth in *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

However, a close examination of the law of Ohio reveals that in doing so, Ohio violated its own declared principles of retroactivity. It selectively enforced its retroactive decision, and it did not equally treat defendants under the same set of facts.

The effect in Ohio of overrulling a former decision was stated in the case of *P. Electric Co. v. Bowers*, 164 Ohio St. 209 (1955):

> The general rule is that a decision of the Court of supreme jurisdiction overruling a former decision is retrospective in its operation and the effect is not that the former law was bad, but that it never was the law.

Ohio is careful to state that the application of a new rule of law to a case pending on appeal is not to be considered retrospective application. *State v. Lynn*, 5 Ohio St. 2d 106 (1966). Ohio appears to adopt the proposition that cases pending on appeal, when a change of law is announced, are entitled to the benefits of the change in the law. *LaBarbera v. Batch*, 5 Ohio App. 2d 151 (Cuyahoga Cty. 1966).

The case of *Pinch v. Maxwell, Warden*, 3 Ohio St. 2d 212 (1965), defines retrospective application as follows:

> The retrospective application of a newly declared ruling, we mean . . .the application of the ruling to conviction, which had become final, i.e., where the subject of conviction has been rendered, the assessability of appeal exhausted, the time for petition for certiorari to the United States Supreme Court has elapsed before the first declaration of such newly declared ruling.

Clearly, respondent Isaac had raised the issue to apply *Robinson* retroactively to his case, not only in the appellate court immediately upon its being published, but also in the Supreme Court of Ohio. Therefore the Supreme Court of Ohio could not claim Isaac's case was "final" before its decision. Of course, *Robinson* was expressly determined to be retroactive to all cases tried after January 1, 1974. The Ohio Supreme Court correctly found that *Robinson* had to be retrospective until that date under the test it set forth in *State v. Carter*, 60 Ohio St. 2d 34 (1979).

Counsel for Isaac can find only one case where the State of Ohio was faced with applying its own state law retroactively. In the case of *State v. Evans*, 33 Ohio St. 2d 185 (1972), two cases

were pending before the Supreme Court of Ohio. Both the defendants raised to the Supreme Court the issue of whether or not the admission into evidence of their mug shots constituted reversable error. In one trial, one defendant objected to the introduction of his mug shot, and the other defendant failed to object. The Supreme Court of Ohio announced its decision in *State v. Bredlove*, 26 Ohio St. 2d 178 (1971), announcing when and how mug shots were admissible into evidence. Citing *State v. Lynn*, 5 Ohio St. 2d 106, with approval, the Court found the change in law applied to cases pending on appeal, but reversed the conviction of only the defendant who objected. The Court affirmed the conviction of the defendant who failed to object to the admission into evidence of his mug at trial by distinguishing *O'Connor v. Ohio*, 385 U.S. 92 (1966), stating that a federal constitutional right was not involved in this case, and therefore, defendant's failure to object procedurally barred the benefit of the decision to him. Here, Isaac's failure to object involved a federal constitutional right.

The Supreme Court of Ohio further held that when counsel could not foresee a change in the law, then his failure to object would not be a bar to review. In the case of *State v. Collins*, 10 Ohio St. 2d 92 (1967), the Supreme Court of Ohio found it could not hold the defendant to foresee *Meissiah v. U.S.*, 377 U.S. 201, since the Ohio Supreme Court held after that decision that the mandate of that decision was inapplicable. That case should control *Isaac* since the Supreme Court of Ohio, *in dicta*, stated three months before Isaac's trial, but after *Mullaney*, that the burden of proof was on the defendant to prove self-defense. If the State of Ohio misled counsel in *Collins* and allowed review, then the State of Ohio also misled counsel in *Isaac* and it should not have barred review.

B. Ohio's Selective Enforcement of Its Retroactive Decision

State v. Humphries, 51 Ohio St. 2d 95, declared *State v. Robinson*, 47 Ohio St. 2d 103, to be retroactive to January 1, 1974. Mr Humphries, at a jury trial, claimed insanity, and the jury was instructed that he had the burden to prove, by a preponderance of the evidence, that he was insane. Ms. Myer, a case consolidated with *State v. Humphries*, went to a court trial alleging insanity. The Supreme Court of Ohio, when it declared *Robinson* retroactive, denied Mr. Humphries a new trial because Criminal Rule 30 required him to object to the jury instructions. However, it granted to Ms. Myer a new trial because Criminal Rule 30 affected only jury trials. Ms. Myer simply did not have to object to the law the judge was considering. In both instances, the triers of fact, i.e., the jury and the judge, were misinformed as to the law to be applied to the case. Both the judge and the jury at the time believed both defendants had to prove, by a preponderance of the evidence, that they were insane. Since the trier of fact was misinformed as to law in both cases, Criminal Rule 30 cannot be rationally related to ascertaining the truth. Only the defendant who exercised his constitutional right to a jury trial was denied a new trial. The defendant who did not want to be exposed to the jury and chose trial by the court was granted a new trial. Two defendants raised identical defenses. Two defendants failed to object. Two triers of fact were misinformed. One defendant received a new trial and one defendant did not. The only distinction is one was tried by a jury and one was tried by the court. Such a distinction cannot stand.

Further, the court held, despite Ms. Myer's failure to object, she properly preserved the record by assigning as error the placement of the burden of proof of insanity. Isaac did likewise, but was not found to have preserved the record.

Question IV:

IT IS A VIOLATION OF DUE PROCESS OF LAW FOR THE HIGHEST COURT OF A STATE NOT TO FIND "PLAIN ERROR" AND TO REFUSE TO ORDER A NEW TRIAL TO CASES PENDING ON REVIEW WHEN THE COURT CHANGES THE LAW A CONSTITUTIONALLY PROTECTED AREA AND DECLARES THE CHANGE TO BE RETROACTIVE?

A. Ohio's Treatment of Plain Error

Isaac raised, in the Supreme Court of Ohio, the issue of plain error pursuant to Criminal Rule 52(b). He further raised the issue of *O'Connor v. Ohio*, 385 U.S. 92 (1966), that his failure to object did not bar his review. The Supreme Court of Ohio, in *State v. Long*, 53 Ohio St. 2d 91 (1978), held that plain error will not lie upon a set of facts so blatant that it appears that plain error will not exist in self-defense cases. Contrary to the intended result, Ohio has permitted Criminal Rule 30 to destroy the effect of Criminal Rule 52(b). *State v. Gideons*, 52 Ohio App. at page 77 (1977). A close review of Ohio law reveals that the Supreme Court of Ohio has *never* granted a reversal based upon the doctrine of plain error. In fact, where the lower courts have found plain error, the Supreme Court has reversed to deny a defendant a new trial. *State v. Durkin*, 66 Ohio St. 2d 158 (1981), *State v. Clayton*, 62 Ohio St. 2d 45 (1980).

The doctrine of plain error is separate and apart from Criminal Rule 30. It recognizes that in certain instances a criminal trial can be so unfair to a defendant that he should be entitled to a new trial, regardless of whether or not his attorney failed to object, or some other procedural bar occurred.

When Ohio declared *Robinson* to be retroactive in the case of *Humphries*, it necessarily found that the trials occurring after January 1, 1974, were improper where the jury was instructed

the defendant had the burden to prove an affirmative defense. The Supreme Court has found such instructions to be prejudicial requiring new trials. However, the Court has continued to adhere to its decision that plain error did not occur in any of those trials.

Counsel for respondent cannot think of a more devastating error than when a jury is misinstructed as to the burden of proof. A defendant is entitled, as a matter of federal due process of law, to have the jury properly instructed as to the law of the case. If the law of the case is changed retroactively, defendant is entitled to a retrial upon the new law. Not to allow a retrial is to incarcerate a defendant under a faulty finding of guilty. *State v. Gideons*, 52 Ohio App. at page 78 (1977), succinctly states respondent's position:

> To properly decide a criminal case, it is essential that the jury has a clear understanding of which party has the burden of proof. Without such an understanding, the jury can not possibly properly perform its function. When in a criminal case the trial court erroneously places the burden of proof on the defendant, that error effects substantial rights of the accused and effects the basic fairness, integrity and public reputation of the judicial process. Such an error is plain error under Criminal Rule 52(b) and may be reviewed by an appellate court where the accused failed to object to the jury instructions as required in Criminal Rule 30.

Henderson v. Kibbe, 431 U.S. 145 (1977), recognizes, "an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law." See also, *Berrier v. Egeler*, 583 F 2d 515 (6th Cir. 1978), *U.S. v. Frady*, 636 F 2d 506 (D.C. 1980).

The Fourth District Court of Appeals for Pickaway County, Ohio, the same court that denied Isaac the benefit of *Robinson* under Criminal Rule 30, later found plain error to exist in *State*

v. Burke (unreported), see appendix. Burke was charged with Carrying a Concealed Weapon and the jury was charged that he had to prove the defense that he was afraid he would be robbed because he carried large sums of money. The Appellate Court reversed finding plain error. Are not all affirmative defenses to be treated the same?

B. Plain Error as a Separate Remedy

Criminal Rule 30 can not be permitted to emasculate Criminal Rule 52, as Ohio attempted to do in *O'Connor v. Ohio*, 385 U.S. 92 (1966). It is difficult to believe that no error ever occurred in Ohio that was so serious a new trial was never warranted. Criminal Rule 30 brings finality to the system. Criminal Rule 5 brings justice.

Since Ohio provides for review under Criminal Rule 52 without regard to Rule 30, federal courts can review under this standard, without regard to *Wainwright v. Sykes. Harlin v. Missouri*, 439 U.S. 459 (1979), *Hockenbury v. Sowders*, 633 F 2d 433 (6th Cir. 1980), *Berrier v. Egeler*, 583 F 2d 515 (6th Cir. 1978), cert. denied, 429 U.S. 955 (1978), *Rachel v. Bordenkircher*, 590 F 2d 200 (6th Cir. 1978), *Cook v. Bordenkircher*, 602 F 2d 117 (6th Cir. 1979), cert denied, 444 U.S. 936 (1979), *Krzeminski v. Perini*, 614 F 2d 121 (6th Cir. 1980).

CONCLUSION

Lincoln Isaac is entitled to his writ of habeas corpus on principles of federal retroactivity. He is entitled to his writ because the State of Ohio violated federal due process of law in the manner in which it arbitrarily selected who would benefit under state retroactive principles. He is entitled to his writ because the State of Ohio, through Criminal Rule 30, has emasculated any review of federal constitutional rights under

plain error, Criminal Rule 52, in violation of federal due process of law. Cause/prejudice is not applicable to bar federal review in habeas corpus and even if it were, both have been shown.

The decision of the en banc panel should be affirmed.

Respectfully submitted,

JAMES R. KINGSLEY

James R. Kingsley

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No. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Superintendent, Chillicothe Correctional Institute, *Petitioner*
v.
LINCOLN ISAAC, *Respondent*

E. P. PERINI, Superintendent, Marion Correctional Institution, *Petitioner*
v.
KENNETH L. BELL, *Respondent*

TED ENGLE, Superintendent, Chillicothe Correctional Institute, *Petitioner*
v.
HOWARD HUGHES, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT KENNETH L. BELL

RICHARD L. AYNES
Counsel of Record
J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

KATHLEEN S. AYNES
P. O. Box 143
Twinsburg, Ohio 44087
(216) 425-8200
Counsel for Respondent Bell

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED FOR REVIEW

I. Was it error to place the burden of proof upon the issue of self-defense on the accused?

II. If so, was that error of constitutional proportions? and

III. If the error was of constitutional significance, are the federal courts without the power to correct an error of this magnitude?

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ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES

Ohio Constitutional Provisions:

ART. I

§1 Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

ART. I

§4 [Bearing arms; standing armies; subordination of military power.]

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

ART. IV

§20 Style of process, prosecution, and indictment.

The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

Ohio Statutes

§2901.21 Requirements for criminal liability.

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

§2945.11 Charge to the jury as to law and fact.

In charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict. The court must also inform the jury that the jury is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge except in cases of murder in the first degree or burglary of an inhabited dwelling.

STATEMENT OF THE CASE

Respondent Bell generally agrees with the statement of the case presented by Petitioner Perini (Petitioners' Brief at 6).[1] However, as authorized by Rule 34.2, Mr. Bell would indicate that there is one material disagreement as to the status of the record before the Court and emphasize certain other facts which, while omitted from Petitioners' Statement of the Case, are nevertheless important to the proper disposition of the issues before the Court.

First. Mr. Bell, acting *pro se*, filed his Petition for Writ of Habeas Corpus on August 1, 1978, alleging:

> "Due process is violated when the judge instructs the jury that the accused must prove an affirmative defense by a preponderance of the evidence." [Petitioner's Application (Petition) for Habeas Corpus at 4.]

There is no doubt that self-defense was properly placed in issue, since the State Court of Appeals rejected Respondent Bell's claim that the jury should have been instructed on other lesser included offenses upon the grounds that:

> "Appellant presented the defense of self-defense. If believed, this would have constituted a complete defense to the crime charged." (J. A. 19.)

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[1]All subsequent references to Petitioners' Brief will be abbreviated as "Pets.' Brief."

Other abbreviations used will include the following:

The appendix to the Certiorari Petition will be referenced as "A"

The Joint appendex will be referred to as "J. A."

The state trial transcript of Respondent Hughes will be referred to as "H. T."

The state trial transcript of Petitioner Isaac will be referred to as "I. T."

The Respondents have lodged with the Clerk's Office copies of 14 unreported Ohio Court of Appeals Opinions. These are bound together and the pages have been consequently numbered. Subsequent references will be abbreviated as: "Addendum."

Nor is there any dispute that the burden of proof upon this issue was placed upon Mr. Bell, since counsel for Mr. Perini specifically admitted:

> "... [Mr. Bell] correctly asserts that the jury was instructed that [Mr. Bell] was required to demonstrate self-defense bya preponderance of the evidence." (Return of Writ at 2.)

Second. Petitioner Perini claims that Mr. Bell "failed to object to the jury instruction" which improperly required him to prove self-defense bya preponderance of the evidence (Pets.' Brief at 6). However, in spite of the requirement of Rule 5 of the Rules Governing Section 2254 Proceedings, Petitioner Perini failed to produce for the Federal District Court below any portion of the transcript which would demonstrate whether Mr. Bell's trial counsel objected to the jury instruction. This failure to include the transcript as part of the record prior to the decision of the District Court below is specifically notd in the Opinion of the Federal District Court (A. 51, n. 3) and by the Petitioners in this proceeding (Pets.' Brief at 6, n. 4).

Third. It should be emphasized that while counsel for Superintendent Perini filed two separate briefs in the District Court, at no time was a claim made that Mr. Bell's counsel had failed to object to the erroneous jury instructions, nor was it argued that the merits of the self-defense claim could not be reached because of the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1972).[2] Rather, Mr. Perini limited his argument to addressing the merits of the constitutional propriety of placing

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[2]Return of Writ, docketed 9/18/78; and Respondent's Reply to Traverse, docketed 9/28/78.

The names of at least five members of the Ohio Attorney General's Office appear on these briefs: Richard David Drake, Randall G. Burnworth, Oliver B. Spellman, William J. Brown and Simon B. Karas.

(continued)

the burden of proof upon the issue of self-defense upon the accused.[3]

Fourth. The two Opinions issued by the District Court below one denying the Petition and the other one denying reconsideration, were both denials upon the merits. (A. 50-55 and 56-59.) After securing his present counsel to represent him on appeal, Mr. Bell presented the following issue for review in the Sixth Circuit:

> "The District Court erred in holding that the trial judge properly instructed the jury that the appellant must prove self-defense by a preponderance of the evidence, thereby violating appellant's fourteenth amendment right to due process."

(footnote continued from proceeding page)

The Solicitor General suggests that the District Court found it "unnecessary to consider whether Mr. Bell's claim was barred by the failure to make timely objection to the instruction . . ." (*Amicus* Brief at 6.) Insofar as this assertion may imply that the issue was properly raised below by Petitioner Perini the record demonstrates the contrary. To the extent the issue was considered, it was raised *sua sponte* by Judge Walinski who seems to have construed the Petitioner's "silence" as having "waived" the *Fay v. Noia*, 372 U.S. 391 (1963) or *Sykes, supra*, issue (A. 51, n. 1).

[3]Mr. Perini's "Reply to Traverse" (docketed: 9/28/78) at page 2, did cite *Sykes, supra*, in this context: In his "Traverse Answer," Mr. Bell, acting *pro se*, argued, in part, that the Sixth Circuit's then recent decision in *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955, was applicable to his case. Mr. Perini filed his "Respondent's Reply to Traverse" for the "sole purpose" of clarifying the decision in *Berrier*. In presenting his argument, Mr. Perini made two points. First, he argued that as "an abstract principle" the decision was in conflict with *Patterson v. New York*, 432 U.S. 197 (1977); *Wainwright v. Sykes*, 433 U.S. 72 (1977); and *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Second, he attempted to distinguish *Berrier* by asserting that under Michigan law self-defense was an element of the crime while claiming that under Ohio law it was not. Nowhere in that two-page argument did Mr. Perini claim either that Mr. Bell's counsel had failed to preserve the error or that *Sykes, supra*, applied to the case at bar.

It was on appeal that counsel for Mr. Perini raised, for the first time, the claim that no objection had been made and that the procedural default rule precluded the Federal Courts from correcting the error (Mr. Perini's Sixth Circuit Brief at 19-20). Mr. Bell replied that his claim was within the plain error doctrine, or *Sykes, supra*. (Sixth Cir. Reply Brief at 10.) At oral argument, counsel for Mr. Bell argued that the Respondent had waived the procedural default issue by failing to properly raise the question in the District Court below.

Since it was clear that Mr. Bell would be entitled to a new trial based upon the authority of *Isaac v. Engle*, 646 F. 2d 1129 (6th Cir. 1980) (*en banc*), without respect to whether Mr. Perini had properly preserved his procedural default claim, the court below apparently found it unnecessary to resolve that issue. *See generally, Bell v. Perini*, 635 F. 2d 575 (6th Cir. 1980) (A. 42-47).

This case is presently before the Court pursuant to the granting of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by this Court's Order of April 20, 1981.

SUMMARY OF THE ARGUMENT

In granting Respondents Bell, Hughes, and Isaac favorable judgments below, the United States Court of Appeals for the Sixth Circuit determined that it was error to place the burden of proof upon the accused to prove that they had acted in self defense. Petitioners do not deny that such an error occurred.

The constitutional significance of that error is evident when one considers that actions taken in self defense are both lawful and constitutionally protected. Indeed, Ohio juries, as juries throughout the country, are instructed that if an accused acts in self defense, that individual has committed no crime and the jury is obliged to return a verdict of not guilty. Therefore, the

instruction which shifted the burden of proof upon the issue of self defense infringes on constitutional rights of the highest magnitude. Since the accused is innocent if he acted in self defense, and since the trial judges instructed the jury that the defendant had the burden of proving by a preponderance of the evidence that he acted in self defense, the ultimate effect of the judges instructions was to require the Respondent to prove his innocence. This is, of course, contrary to the decisions of this Court in *In re Winship*, 397 U.S. 358 (1970) and its progeny.

In spite of the fundamental nature of this error, the argument is advanced that the federal courts lacked the power to correct an error of even this magnitude because of an alleged failure of Petitioner Bell's trial counsel to make an objection to the jury instruction. An examination of the history of these proceedings demonstrates that Petitioner Perini has failed, on two separate grounds, to preserve his claimed defense upon this ground.

Initially, he failed to file the transcript with the District Court below and consequently the record before this Court does not contain the factual predicate necessary for a procedural default: there is no showing that there was a failure to object to the improper jury instruction. Second, at no time during the proceedings in the District Court below did Mr. Perini raise as a claim that there was a procedural default which would bar considerations of the merits of this case. Thus, under the applicable rules of court, he has waived any defense that he might have on that issue.

Even if it were assumed, *arguendo*, that the procedural default issue had been properly preserved, the application of that doctrine to the cases at bar is inappropriate. Initially, the error should be addressed under the constitutional plain error doctrine. Moreover, given the particular facts of the cases at bar, application of a contemporaneous objection rule would not only

violate procedural due process, but also substantive due process and equal protection of the laws as guaranteed by the Fourteenth Amendment.

Further, in order to properly invoke a rule of preclusion, the State must present adequate and independent grounds for its refusal to reach the merits of a federal claim. The Ohio courts have attempted to use a procedural default to defeat the jurisdiction of the federal courts, while reserving for themselves jurisdiction to review the same class of cases even though no objection was made. Equally as important, the State has advanced no legitimate state interest in enforcing its contemporaneous objection rule in these cases, which is not already protected by other, more effective remedies than the creation of a procedural bar.

Finally, if the Court were to pursue the *Sykes* issue, in this class of cases where the burden of proof was improperly shifted, there was no arguable, tactical basis for the defendant to accept a higher burden of proof than required by law. Accordingly, whether an alleged failure to object is analyzed under standards involving ineffective assistance of counsel, inadvertence or futility, cause exists under *Sykes*. Further because of the magnitude of the error, there can also be no doubt as to the existence of prejudice.

Consequently, Mr. Bell submits that the error in his case was of constitutional magnitude and the State has waived the procedural defense it now seeks to assert. Further, the State has no adequate interest to support its nonfederal decisional ground. Finally, cause is present in this case, enabling this Court to reach the merits and affirm the decision below.

ARGUMENT

I.
INTRODUCTION

The disposition of the case at bar involves the consideration of three separate issues:

I. Was it eror to place the burden of proof on the issue of self-defense on the accused?

II. If so, was that error of constitutional proportions? and

III. If the error was a constitutional significance, are the federal courts without the power to correct an error of this magnitude?

Though these issues are fairly encompassed within the "questions presented" by Petitioner, the consideration of the issues in the order set forth above makes for a more logical and orderly presentation of the case.

II.

IT WAS ERROR TO PLACE THE BURDEN OF PROOF UPON THE ISSUE OF SELF-DEFENSE ON THE DEFENDANTS.

In each of these cases the Respondents maintained that they were innocent of the crimes with which they were charged because they had acted in lawful self-defense. The state nevertheless required each defendant to prove his innocence by instructing the jury that the burden of proof upon the issue of self-defense was upon the accused.[4] At the time of each of the

[4]Respondent Isaac (I. T. 227-230; J. A. 3-4, Respondent Hughes; H. T. 340-344; J. A. 44-46; and Respondent Bell (Admission of Superintendent Perini, Return of Writ at 2.)

three trials, Ohio Revised Section 2901.05(A) provided, in part:

> "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused." (A. 2.)

In *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976), the Ohio Supreme Court held:

> "... the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise [an affirmative] defense, and does not have the burden of establishing such defense by preponderance of the evidence. (R. C. 2901.05[A] construed.)" (Syllabus.)[5]

There can be no doubt that this holding was applicable to the 1975 trials of these Respondents since in *State v. Humphries*, 51 Ohio St. 2d 121, 364 N.E. 2d 369 (1977) (Syllabus 4), the Court held that this interpretation of R. C. 2901.05 applied to all trials held on or after January 1, 1974. The effect of the statute was that;

> "The state then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense." (Pets.' Brief at 4 and *Amicus* Brief of the Ohio Prosecuting Attorneys Association at 1.) *Accord, e.g., State v. Jones*, 67 Ohio St. 2d 244, 248, N.E. 2d , (1981).

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[5]In Ohio the syllabus is prepared by the judges of the Court. It is the syllabus which states the controlling law. *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 441, n. 3 (1952).

III.

THE ERROR WAS OF CONSTITUTIONAL PROPORTION

While admitting that the burden of proof of self-defense was improperly placed upon the Respondents, Petitioners maintain that this error was simply a matter of state law in which the error did not rise to constitutional significance.[6] Mr. Bell submits that the Circuit Court below was correct in finding that this shift in the burden of proof was a violation of their rights underr the Federal Constitution upon five separate grounds:

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[6]Petitioners analyze this question as an aspect of "prejudice" under *Sykes, supra. See* Pets.' Brief at 17-22.

Of the thirteen Circuit Judges who considered this issue below, it was only the dissenting opinion by Circuit Judge Lively, joined by Judges Engle and Kennedy, which maintained that there was no constitutional violation. This argument was premised upon the theory that self-defense was a "confession and avoidance and that the jury does not reach a defense of self-defense until it finds that all the elements of an offense have been established beyond a reasonable doubt." *Isaac, supra,* at 1129 (A-18). This interpretation of state law, unsupported by any citation of authority, is directly contradicted by the decision of the Ohio Supreme Court in *State v. Abner,* 55 Ohio St. 2d 251, 254, 379 N.E. 2d 228, 230 (1978); *State v. Chase,* 55 Ohio St. 2d 237, 378 N.E. 2d 1964 (1978) (Syllabus 2); and *State v. Jones, 67 Ohio St. 2d 244, 248, N.E. 2d , (1981). See infra,* notes 10 and 11, quoting the language from these cases which establishes that self-defense is relevant to creating a reasonable doubt as to the defendant's guilt and if such a doubt is created by self-defense, then the defendant must be acquitted.

Further, as Judge Jones properly notes, Judge Lively's interpretation would have the result that "the burden of proof of the affirmative defense of self-defense is on neither the defendant nor the prosecution." *Isaac* at 1137; (A. at 14.) In effect, Judge Lively's position is that self-defense is totally unrelated to guilt or innocence. Besides the problems set forth above, this position is refuted by the jury instructions in the cases at bar which told the jury that if the accused acted in self-defense "not guilty" verdicts should be returned. (I. T. 230; J. A. 5; H. T. 343; J. A. 46.)

(A) it violated fundamental fairness under the Fourteenth Amendment due process clause;

(B) it violated due process because the burden of proof, once established by the state, cannot be shifted to the accused;

(C) under Ohio law the absence of self-defense is a necessary ingredient of the crime which *Patterson v. New*

(D) requiring the accused to prove self-defense requires him to negate a number of ingredients of the crime in violation of *Patterson;* and

(E) the state cannot constitutionally make action taken in self-defense a crime.

A. Due Process: Violation of Fundamental Fairness

If an error in a jury instruction infects the entire trial so that a fair trial cannot be had, the constitution will grant redress. *See Cupp v. Naughten*, 414 U.S. 141 (1973). The erroneous instruction here not only relieved the state of its burden of proof beyond a reasonable doubt, but also placed a burden of proof by a preponderance upon the accused.[7] Both changes in the burden of proof occurred with respect to the question of self-defense which was the primary fact in issue. The significance of this error was outlined in *State v. Gideons*, 52 Ohio App. 2d 70, 77, 78, 368 N.E. 2d 67, 73 (1977):

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[7]In 1978 the State of Ohio amended its statute to now require the accused to bear the burden of proof on affirmative defenses. The Ohio Supreme Court recognized that the effect of this statute was that:

> "... the state's burden is correspondingly lessened as the defendant's is increased." *State v. Jones*, 67 Ohio St. 2d at 248-249, N.E. 2d at (1981).

> "To properly decide a criminal case, it is essential that the jury has a clear understanding of which party has a burden of proof. Without such an understanding, *the jury cannot possibly properly perform its function.*" (Emphasis added.)

That Court held that the jury instruction on self-defense was "critical to the fairness of the guilt-determining process." *Id.* at 77. *See also United States v. Corrigan*, 548 F. 2d 879, 882 (10th Cir. 1977) and *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978).

It is important to emphasize that what we deal with here is not simply a matter of procedure or evidence. Rather, the instruction on the burden of proof goes to the very question of guilt or inocence and hence to the heart of the fact-finding function of the jury. In almost any other situation, a conscientious jury could still arrive at a reliable and proper verdict notwithstanding the creation of even constitutional errors.

For example, a conscientious jury may well ignore the effect of an involuntary confession that is improperly admitted into evidence for the same reason that the judge should have excluded it in the first place. A rational jury may ignore inflammatory arguments of the prosecutor or comments upon silence and, by focusing upon the question of whether the state proved guild beyond a reasonable doubt, still perform its function in fairness to both the accused and the state. But here a conscientious jury would have followed the erroneous jury instructions. If the evidence in the minds of the juries in these three cases raised a reasonable doubt as to whether the defendant acted in self-defense a conscientious jury would nevertheless vote to convict if it felt that the accused had not proved self-defense by a preponderance of the evidence.

Since the instruction erroneously shifted the burden of proof upon a matter which was not only the primary issue in dispute but also made the whole difference between guilt and innocence, a fair trial was impossible, and due process was violated.

B. Due Process: Comparison to the Elements of the Crime

Allocating the burden of proof is part of the "crime-defining" power of the State. It is analogous to the power to define the essential ingredients of a crime: while there are limits beyond which a State cannot go, the State generally is free to make its own choices about the definition of a crime. *Patterson v. New York*, 432 U.S. 197 (1977). However, *Patterson* also teaches that once the State makes a determination as to the existence of the essential ingredients of a crime, it is bound by that definition. Any attempt on behalf of the State to make the accused assume the burden of proof of one of those ingredients — whether directly or indirectly — violates due process.

Similar considerations apply with respect to the burden of proof. Even if it were assumed *arguendo*, that the State was free to decide whether or not to accept the burden of proof on the question of self-defense, once it made that decision it is bound by it.[8] Any error which would potentially misinform the jury as to who has the burden of proof is so critical to the truth-finding function that it violates due process. *See Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. den.* 439 U.S. 955 (1978).

As Judge Celebrezze indicated in the panel decision below, "the definition and placement of the burden of proof is a fundamental aspect of the truth-finding process of a criminal trial," and "[r]edefining the burden of proof placed upon the defendant, whether it be by a new constitutional rule or by a new

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[8]The "quantum" of proof the State of the defendant is required to bear, is considered "substantive" rather than procedural. Hence, any change in the burden of proof after the commission of a crime but prior to the trial of the accused is specifically prohibited by the *ex post facto* clause of the United States Constitution, Article I, Section 10, paragraph 1. *E.G., State v. Jones, supra.*

statutory interpretation of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function." (646 F. 2d at 1129; A. 34-35.)

This view finds support in *Hicks v. Oklahoma*, 447 U.S. 343 (1980). While the circumstances of that case are somewhat different, the analogy is most striking. Subsequent to the Petitioner's conviction, a state court decision rendered the jury instruction invalid. The state argued that since the instruction dealt with sentencing, it was merely a "denial of a procedural right of exclusively state concern." *Id.* at 346. This Court rejected that argument, holding that "an arbitrary disregard of the Petitioner's right to liberty is a denial of due process of law." *Id.* at 346 (footnote omitted). Since *Hicks* involved merely a question of a degree of punishment once guilt was determined, and the instruction in the case at bar goes to the very heart of the determination of guilt or innocence, *Hicks* applies *a fortiori*.

C. Patterson: The Absence of Self-Defense as an Essential Ingredient of the Crime

In *Patterson v. New York, supra*, this Court sustained the placement of the burden of proof upon the accused on the issue of "extreme emotional disturbance" because proof of that fact bore no relationship to guilt or innocence. Further, proof of the defense did "not serve to negate any facts of the crime which the State is to prove in order to convict a murderer." *Patterson, supra* at 206-207. *Patterson, Hankerson v. North Carolina*, 432 U.S. 233 (1977), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), when read together, at least stand for the proposition that the state can neither make the accused assume the burden of proof on any ingredient of the crime nor can it make him prove any defense which would necessarily negate a fact which the state

must establish in order to convict. If proof of the defense is relevant to guilt or innocence, then it must be borne by the state.[9]

The Ohio Supreme Court has made it clear that self-defense is relevant to the issue of guilt or innocence. In referring to the "majority rule" the State Supreme Court wrote:

> "That approach is to require the state to bear the burden of persuasion beyond a reasonable doubt upon every issue *necessary to convict* . . ." *State v. Robinson*, 47 Ohio St. 2d at 108, 351 N.E. 2d at 92. (Emphasis added.)

In that same decision the Court indicated that it was this majority rule which the State Legislature had codified in R. C. 2901.05, 47 Ohio St. 2d at 110; 351 N.E. 2d at 93. In subsequent decisions the Court held:

> " . . . the trier of fact must consider *all* the evidence in the case, *including all the evidence as to the affirmative defense*, and if the trier of fact entertains a reasonable doubt of defendant's guilt the defendant must be acquitted . . . " *State v. Chase*, 55 Ohio St. 2d 237, 378 N.E. 2d 1064 (1978) (Syllabus 2) (emphasis added).

Accord, State v. Abner, 55 Ohio St. 2d 251, 254, 379 N.E. 2d 228, 229 (1978);[10] *State v. Jones*, 67 Ohio St. 2d 244, 248,

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[9]Ohio does have a number of "defenses" which — unlike self defense — bear no relationship to guilt or innocence but which do "mitigate" the degree of punishment. *E.g.*, Ohio Revised Code Section2905.01(C) (providing that kidnapping, a first degree felony, shall be reduced to a second degree felony if the victim is released in a safe place unhamed.)

[10]"Once the affirmative defense of self-defense has been properly raised, the trier of fact *must consider it and all the evidence* in the case and if, after doing so, the trier of fact entertains a reasonable doubt of the defendant's guilt he must be acquitted." 55 Ohio St. 2d at 254, 379 N.E. 2d at 229. (Emphasis added.)

N.E. 2d , (1981).[11] In fact, jurors are specifically instructed that "if you find the defendant proved self defense, then you must find the defendant not guilty." [H. T. 343; J. A. 46; 4 Ohio Jury instructions Section 413.05 (1974). *See* I. T. 230; J. A. 5.]

Therefore in a proper case the absense of self-defense *is* one of the ingredients of the crime which the State must prove beyond a reasonable doubt. The Petitioners admit as much when they indicate that after *Robinson* the State bore "the burden of proof beyond a reasonable doubt, not only to the statutory elements of the crime, but also to the nonexistence of the affirmative defense." (Pets.' Brief at 4.)

The plurality below, after examining the Ohio statute, found:

> "... once a state assumes the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume. From the point of view of fairness and due process, there is no practical difference between requiring it to meet the assumed burden of proving absence of affirmative defenses beyond a reasonable doubt." *Isaac, supra* at 1135-36. (A. at 9, 10.)

There should, therefore, be no doubt that the absence of self-defense is one of the necessary ingredients the state must prove beyond a reasonable doubt.

But the Petitioners attempt to avoid this by resort to two arguments. First, Petitioners attribute some talismanic quality to the term "affirmative defense" and maintain that because Ohio cases have referred to self-defense by that "label" it is

[11] "This burden [of going forward] requires the defendant to adduce evidence of his defense sufficient to cause a reasonable doubt on the question of his guilt. If he carries that burden, the defendant should be acquitted, regardless of whether he has proven the substance of his defense by a preponderance of the evidence." 67 Ohio St. 2d at 248, N.E. 2d at .

proper to place the burden of proof upon the accused.

But, if the State chose to label alibi an affirmative defense, would that place the burden of proof upon the accused? If the State chose to label a plea of "not guilty" an affirmative defense, would that mean that the accused is required to prove that he was not guilty?

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the State of Maine called "provocation" for manslaughter purposes an affirmative defense. Notwithstanding that label this Court held that it violated due process to place the burden of proof on that issue upon the accused. Though the effect of *Mullaney* was restricted in *Patterson v. New York, supra*, its essential holding with respect to the "provocation" issue was not overruled. Indeed, the vitality of that *Mullaney* principle is attested to both by *Hankerson v. North Carolina, supra* and the subsequent citation of *Mullaney* with seeming approval. *E.G., Sandstrom v. Montana*, 442 U.S. 510 (1979).

In *Patterson v. New York*, 432 U.S. 197, 210 (1977), this Court stated the truism that the proof of the non-existence of "*all* affirmative defenses" had never been required. (Emphasis added.) But by implication it has also indicated that proof of the non-existence of some affirmative defenses was constitutionally required. Reference to *Leland v. Oregon*, 343 U.S. 790 (1952) and *Mullaney v. Wilbur, supra*, indicates that the State may be required to disprove some "affirmative defenses," such as provocation, and may not be required to prove others, such as insanity. Consequently, calling something an affirmative defense no longer indicates anything about who has the burden of proof. For constitutional purposes, the label the State attached to self-defense is irrelevant.

Petitioners' second line of attack is based upon *State v. Abner, supra*, where it was stated that the jury need not be instructed that the state had the burden of proving the absence of self-

defense. (Pets.' Brief 18-19.) Though not fully articulated, the Petitioners' position is based upon a syllogism. The major premise is that the Ohio Supreme Court would have required a specific instruction upon all 'elements" of the crime which the state was required to prove beyond a reasonable doubt. The minor premise is that the Court in fact held that no such instruction was required with respect to self-defense. The deduction that the State then makes is that since no instruction was required, it must follow that self-defense is not an element of the crime.

The fallacy in Petitioners' reasoning lies in their major premise. An examination of *Abner* reveals that nowhere did the Ohio Supreme Court specifically indicate that the absence of self-defense was *not* an element of the crime.[12] As set forth above, an analysis of Ohio case law demonstrates that proof of the absence of self-defense is a fact "necessary for conviction," and hence can only properly be construed as an "element" of the crime.But, how could the State Supreme Court in *Abner* indicate, on the one hand, that self-defense must be considered in determining guilt or innocence, and, on the other hand, that there was no requirement to instruct the jury that the State had the burden of disproving self-defense beyond a reasonable doubt? The answer lies in the Ohio Court's reliance on *State v. Millett*, 273 A. 2d 504 (Me. 1971) in both *Robinson* and *Abner*. Under Maine law, the jury is specifically instructed that the act

[12]Of course, even such a statement by the State Supreme Court could not elevate form over substance. This Court has referred to the "elements" of crimes in evaluating burden of proof issues, *e.g., Patterson v. New York*, 432 U.S. 197, 201 (1977). Yet a careful examination of this Court's cases will reveal that generally the Court was concerned with "every fact necessary to constitute the crime, *In re Winship*, 397 U.S. 358, 364 (1970), "essential ingredient(s) of the crime," *Hankerson v. North Carolina*, 432 U.S. 233, 238 (1977) and whether "facts necessary to constitute the crime" were presumed or inferred, *Patterson v. New York, supra* at 205-206.

must be "unlawful" and that self-defense is "lawful" conduct. By giving both a general instruction that the state is required to prove guilt beyond a reasonable doubt and a specific self-defense instruction that self-defense is relevant to raise that issue of reasonable doubt, the jury in Maine does not need any further specific instruction. Because the Ohio courts have not traditionally instructed upon "unlawfulness' nor explained that self-defense can raise a reasonable doubt as to guilt, a different set of circumstances exist. It was the Ohio Supreme Court's failure to recognize this difference that apparently led to its decision in *Abner.* When the case is fairly read, it does not stand for the propositions cited by the Petitioners, but rather stands for the proposition that while the State does have the burden of disproving self-defense, the jury need not be instructed on that issue. Though this may itself violate due process,[13] it has no bearing upon the absence of self-defense as an essential ingredient to be proven by the State.

Because self-defense is relevant to guilt or innocence and because it is a "necessary" fact which the state must prove beyond a reasonable doubt in order to convict, it follows that the absence of self-defense is an essential ingredient of the crime. Consequently, under *Patterson,* the accused cannot constitutionally be required to prove self-defense.

D. Proof of Self-Defense Negates Five Other "Ingredients" of the Crime Which the State Must Prove

1. Self-Defense Negates Criminal Conduct

It is axiomatic that the State can only punish criminal conduct. *E.g., Robinson v. California,* 370 U.S. 660 (1962). His-

[13]See *Collins v. Blodgett,* 513 F. Supp. 1056 (D. Mont. 1981).

torically killing another in self-defense has been lawful, *e.g.*, *State v. Marts*, 26 Ohio St. 162 (1875) (Syllabus 2) *cited with approval, in State v. Melchior*, 56 Ohio St. 2d 15, 21, 381 N.E. 2d 195 (1978). Yet allegations of criminal or unlawful conduct were made against each of the three Respondents in the case at bar.[14]

Like alibi, self-defense establishes that the accused committed *no crime at all:*

> "Killing . . .by one acting in self-defense against an attack by annother is not a crime." *State v. Jones*, 47 Ohio App. 2d 8, 14, 351 N.E. 2d 798, 803 (1975).

Accord, State v. Clifton, 32 Ohio App. 2d 284, 290 N.E. 2d 921 (1972).

In the cases at bar, the jury was told that a finding that the actions were taken in self-defense should result in the jury returning a not guilty verdict.[15] In *Mullaney, supra*, it was found to be constitutional error to require the accused to prove a fact which negated only a single element of the crime and which made a difference only as to the seriousness of the offense of which the accused was guilty. *Mullaney* should apply to the case at bar, *a fortiori*, where proof of self-defense would negate the entire crime and establish complete innocence.

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[14]The indictment against Mr. Bell and Mr. Isaac alleged tha they acted "unlawfully." (J. A. 2; 14). The indictment against Mr. Hughes alleged that he committed a "crime" (J. A. 41).

[15]4 *Ohio Jury Instructions*, Section 413.05 (1974) suggests the jury be instructed:

> ". . . if you find that the defendant proved bya preponderance of the evidence the defense of self defense, then you must find the defendant not guilty."

Such an instruction was given in both Mr. Hughes' (H. T. 343; J. A. 46) and Mr. Isaac's case. (I. T. 230; J. A. 5).

2. Self-Defense Negates Criminal Intent

> "Criminal liability is normally based upon the concurrence of two factors, 'an evil-meaning mind [and] and evil-doing hand . . .'" *United States v. Bailey*, 444 U.S. 394, 402 (1980).

Ohio law requires that for an act to the criminal there be a "blame-worthy" mental state — a "guilty state of mind." *See* Legislative Committee Comments to Ohio Revised Code Sections 2901.21 and 2901.22. A person who acts in *lawful* self-defense cannot be said to have a state of mind which is either "blame worthy" or "guilty." In *State v. Clifton*, 32 Ohio App. 2d 284, 286, 287, 290 N.E. 2d 921, 923 (1972), the Court concluded "one who kills in self-defense does so without the *mens rea* that otherwise would render him culpable of the homicide."

In Mr. Isaac's case below, Chief Judge Edwards found that:

> "Criminal intent of aggravated assault and self-defense are, in my view, completely irreconciliable. To require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent." (Footnote omitted.) *Isaac v. Engle, supra* at 1136 (A. at 10-11.)

Accord, State v. Robinson, 48 Ohio App. 2d 197, 206, 209, 356 N.E. 2d 725, 731, 732 (1975), *affirmed on other grounds*, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976).

3. Self-Defense Negates the Voluntary Act Requirement

R. C. 2901.21(C) requires that acts be voluntary before criminal liability can be imposed. As Justice Holmes indicated, "detached reflection cannot be demanded in the presence of an uplifted knife," *Brown v. United States*, 256 U.S. 335, 343 (1921). Actions taken in self-defense are based upon the "instinct" for self-preservation and arise "spontaneously." *Stoffer v. State*, 15 Ohio St. 47, 52-53 (1865), *overruled on other grounds, Mead et al., v. McGraw*, 19 Ohio St. 55, 62 (1869). This was the exact conclusion reached in *State v. Hardy*, 60 Ohio App. 2d 325, 329, 397 N.E. 2d 773, 776 (1978):

> "A legitimate act on self defense is much more *a mere reflex action* than one committed voluntarily." (Emphasis added.)

4. Self-Defense Negates the Peace and Dignity Allegation

Since its origin the State of Ohio has required that all indictments allege that the acts complained of were "against the peace and dignity of the State of Ohio.[16] The "manifest object" of this requirement was to provide:

> "A sufficient and uniform conclusion to the *allegations of fact constituting the charge." State v. Stapely*, 19 O.D. (N. P.) 1110, 1111 (Hamilton Cty. Common Pleas Ct., 1908), (Emphasis added.)

See also State v. Nieto, 101 Ohio St. 409, 428 (1920). (Wanamaker, J., dissenting.)

Since action taken in lawful self-defense is not illegal, it cannot be against the Peace and Dignity of the State of Ohio. Consequently proof that conduct was in self-defense would negate the Peace and Dignity element.

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[16]Art. IV, Section 20, Ohio Constitution. *See also* O. R. C. Section 2941.06

5. Self-Defense Negates Unlawfulness

> "By definition, the indictment for a criminal offense must therefore charge the general allegations of unlawfulness of the conduct of the defendant in addition to the specific elements which constitute the criminal offense." *Simon v. State*, No. 6262 (2d Dst. Ct. App., January 16, 1980) at 13 (Addendum at 119).

Thus, the mere allegation that a crime has been committed is an allegation of unlawfulness.

"Unlawfulness" may also be considered a common-law element to every crime. While there are no common-law *crimes* in Ohio, R. C. 2901.03, there are common-law elements to existing statutory crimes. *E.g., Columbus v. Fisher*, 53 Ohio St. 2d 25, 372 N.E. 2d 583 (1978); *Birney v. Ohio*, 8 Ohio Rpts. 230 (1837). Even when there has been no express "unlawfulness" element in the statutes prescribing murder, Ohio law has preserved unlawfulness as an element:

> "If 'intent to kill' under all the circumstances of the transaction was justifiable . . . *in lawful self-defense*, the legislature could not be held reasonable to intend to declare it an offense. It is only where the intent to kill was unlawful and *wrongful* that it should be held to constitute a crime . . ." *State v. Stout*, 49 Ohio St. 270, 283-284 (1892). (Emphasis added.)

Further, the Peace and Dignity language required by the Ohio Constitution is an allegation that the conduct was "unlawful." *Hamilton v. Alvis*, 109 Ohio App. 298, 301 (1959). *See State v. Nieto, supra. See* Note 14, *supra.*

Two recent cases that considered these issues have noted the "peace and dignity" requirement of the Ohio Constitution; cited with approval *Hamilton v. Alvis*' conclusion that this constitutes an allegation of unlawfulness; and concluded

that self-defense negates such an allegation. *State v. Tuncle*, No. 38424 (8th Dist. Ohio Ct. of App., March 8, 1979) at 6-7 (Addendum 128-129);[17] and *State v. Simon*, No. 6262 (2nd Dist. Ohio Ct. of App., January 16, 1980) at 12-13 (Addendum at 118-119).[18]

It should therefore be clear that unlawfulness is an element of the crime which the state must prove beyond a

[17]There is some confusion as to the precedential stature of *Tuncle* engendered by the opinion of the Sixth Circuit in *Carter v. Jago*, 637 F. 2d 449, 456, n. 6 (6th Cir. 1980). An examination of *Carter* will reveal that the Court made three separate errors in its treatment of *Tuncle*.

First. The Court suggests that the *Tuncle* opinion was *dicta*. However, an examination of *Tuncle* (p. 4), indicats that the Court was treating the argument of the prosecutor that he "does not have to prove a lack of self-defense beyond a reasonable doubt."

Second. The Circuit Court indicates that *Tuncle* was "superseded" by *State v. Newell*, No. 40470 (8th Dist. Ohio Ct. App., March 13, 1980). But, even though the Eighth District Court of Appeals is a multi-judge, multi-panel (9 judges, 3 panels) District, there is no mechanism, short of a decision by the Supreme Court, by which decisions can be "superseded." One panel does not have the authority to overrule the decision of another.

Third. *Newell* was a case involving duress — not self-defense — and hence has no applicability to self-defense. The *Newell* panel seems to have recognize this fact since it neither cited nor discussed *Tuncle*.

[18]The *Simon* opinion reversed on two grounds, one for violation of the *ex post facto* clause and the second for constitutional reasons on the shifting of the burden of proof. Though conceding the propriety of the ruling on the first ground, the State moved for reconsideration on the secod ground. In response to that request, the Court issued a "Supplemental Opinion" on January 22, 1980 indicating that since it reversed on the first question, "the constitutionality of [Section 2901.05(A)] . . .is not at issue in this appeal and is in no posture for decision." (Addendum at 121). Cf. Ohio Appellate Rule 12.

Nevetheless, it is clear that the Court did not "withdraw" its prior opinion, nor forbid reference toit. Certainly the construction placed upon the statute by three respected judges is worthy of consideration in the absence of other controlling authority.

reasonable doubt. Yet, it is equally true that proof of self-defense necessarily negates this element of the crime. Ohio cases have uniformly recognized that proof of self-defense would negate the element of unlawfulness and utilize what is now an unconstitutional presumption to place the burden of proof on self-defense on the defendant. *E.g., Silvus v. State* 20 Ohio St. 90 (1871).[19] *See also, McElroy v. Holloway,* 632 F. 2d 605 (5th Cir. 1980), *cert. den.* 49 U.S.L.W. 3881 (1981); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom Hankerson v. North Carolina,* 432 U.S. 233 (1977); *Commonwealth v. Hilbert,* 382 A. 2d 724, 731 (Pa. 1978). Thus Constitutional error occurred when the court required these defendants to prove their innocence by disproving the unlawfulness element of the crime.

E. The State Cannot Constitutionally Make Actions Taken in Self-Defense a Crime

Because self-defense is inconsistent with criminal activity, the State can justify placing the burden of proof upon the accused *only* if it criminalizes actions taken in self-defense. Though the Ohio Attorney General has argued that the State has

[19]Petitioners have suggested that because self-defense has been denominated an "affirmative defense" its existence is "wholly collateral" to the elements of the crime. (Pets.' Brief at 18.) However, an examination of *State v. Silvus, supra* at 99 and 101 makes it clear tha proof of a killing raised a presumption of unlawfulness which self-defense rebutted. This presumption theory has been utilized in more modern cases, *e.g., State v. Robinson,* 161 Ohio St. 213, 118 N.E. 2d 517 (1954); *State v. Kinnemore,* 34 Ohio App. 2d 39, 295 N.E. 2d 680 (1972). In *State v. Humphries,* 51 Ohio St. 2d at 98, 364 N.E. 2d at 1357, *Silvus* is cited as authority for what the common law (pre-1974) rule was in Ohio with respect to the burden of proof on self-defense.

done this,[20] one should not lightly make this inference since the right to act in self-defense is protected by two separate provisions of the State Constitution.[21]

Moreover, any attempt by the State to criminalize self-defense would violate several provisions of the Federal Constitution. First, a command by the State that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd. For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[22] Second,

[20]In the District Court in Respondet Hughes' case, counsel for Mr. Engle argued:

> "The legislature has defined what act and what intent are required in order for a finding of *crime*. Since self-defense is a confession and an avoidance, the most that can be said is that the legislature did not intent to punish that which would otherwise be a crime." (Emphasis added.) "Respondents' Reply to Petitioner Hughes' Memorandum on the Merits" at 2. (Docketed: 6/25/79.)

[21]Article I, Section 1 of teh Ohio Constitution provides in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and *defending life . . .and* obtaining . . .*safety*. (Emphasis added.)

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense [sic] and *security . . .*" (Emphasis added.)

This latter provision is "intended to . . .afford the citizen [a] means for his defense of self and property." *State v. Hogan*, 63 Ohio St. 202, 219, 58 N.E. 572 (1900).

[22]IIIn *State v. Hardy*, 60 Ohio App. 2d 325, 329, 397 N.E. 2d 773, 776 (1978) the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his lifel . . .without due process of law. Obviously the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

to punish one whose only "crime" was to save his own life when attacked by a wrongdoer would be violative of the cruel and unusual punishment provision of the Eighth Amendment.[23]

Equally as important, the attempt to deprive the people of the "right" of self-defense by making such conduct criminal would deny them constitutional rights reserved and protected under both substantive due process under the Fourteenth Amendment and the Ninth Amendment. With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *quoted with approval*, *Patterson*, *supra* at 201-202. It should not be open to question that self-defense is such a right.

Historically, a homicide which resulted from an act taken in legitimate self-defense was justifiable and not unlawful. *Mullaney supra* at 692.

This right was also recognized in early Federal case law:

> "Where crime is committed with impunity . . .those unprotected by other sanctions . . .[are] compelled . . .to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security."

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[23]The Eight Amendment prohibits cruel and unusual punishment—including punishment that is disproportionate to the "offense." *Coker v. Georgia*, 433 U.S. 584 (1977). Punishment for *any* lawful act, including self-defense is both disproportionate and cruel and unusual. *See also Holloway v. McElroy*, 632 F. 2d 605, 627, and n. 35, and 636, n. 49, noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

United States v. Rhodes, 27 Fed. Cas. 785 (Cir. Ct. Ky.) (1866).[24]

See, e.g., Wallace v. United States, 162 U.S. 466 (1896).

As acknowledged by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense,therefore, as it is justly called *the primary law of nature*, so it is not, *neither can it be in fact, taken away by the law of society.*" *Reed v. State*, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Under the Ninth Amendment:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

To deny a citizen the right of self-defense would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," *Boyd v. United States*, 116 U.S. 616, 630 (1886). Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." *Stoffer v. State*, 14 Ohio St. 47, 53 (1864).

Accordingly, the State cannot justify placing the burden of proof on self-defense upon the accused under the theory that it has criminalized such conduct.

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[24]Compare Justice Rehnquist's opinion in *Coleman v. Balkcom*, ____ U.S. ____, 49 U.S.L.W. 3803, 3806 (June 15, 1981) (dissenting from denial of certiorari):

> "In Atlanta, we cannot protect our small children at play. In the Nation's Capitol, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment." (Footnote omitted.)

IV.

WHEN THE BURDEN OF PROOF IS SHIFTED SO AS TO IMPAIR THE ACCURACY OF THE JURY'S VERDICT, THE FEDERAL COURTS ARE NOT POWERLESS TO CORRECT THE ERROR.

Petitioners assume, without discussion, that the *Sykes* procedural default rule is applicable to the cases at bar and proceed to argue that neither "cause" nor "prejudice" has been shown. However, a careful examination will reveal that: (A) the principles of *Sykes* are not applicable to cases such as the ones presently before the Court; (B) under the facts of these cases, any attempt to apply a contemporaneous objection rule would violate procedural due process, substantive due process, and equal protection as guaranteed under the Fourteenth Amendment; and (C) even if *Sykes* were applicable, both cause and prejudice have been demonstrated. For purposes of clarity, each of the points will be analyzed separately.

A. Sykes Is Not Applicable To the Cases Presently Before This Court

1. Jury instructions which erroneously place the burden of proof upon the accused constitute "plain constitutional error."

The contrast between the fundamental nature of the error in the case at bar and those cases in which this Court has held that a procedural default resulted in a forfeiture of a right to have a claim adjudicated on the merits is significant. Both *Davis v. United States*, 411 U.S. 233 (1973) and *Francis v. Henderson*, 425 U.S. 536 (1976) involved challenges to the compositions of the grand juries. As important as it is that

grand jurors be properly selected, the claim did "not in any way affect the determination of guilt or innocence, but allege(d) only a curable defect in the initiation of the proceeding." (Brief of the U.S. in *Davis* at 16.) In arguing for application of the rule in *Davis*, the United States specifically indicated that it did not argue that a rule could be adopted "barring collateral relief on all claims not timely asserted without regard to the effect of the alleged constitutional violation on a defendant's right to a fair trial. ." (Brief of the U.S. at 14). The United States stressed that the rule did not apply "to objections or defenses which go to the fairness of the guilt determining process . . ." (Brief of the U.S. at 15).

In *Estelle v. Williams*, 425 U.S. 501 (1979), this Court held that there was no violation of any constitutional right since there was no "compulsion" that the accused appear at trial in prison clothes. It was also noted that the appearance before a jury in prison clothes did not involve a "fundamental right", *Estelle, supra* at 508, n. 3, nor implicate the truth-finding function of the jury.

The situation was no different in *Sykes*. That case involved not a violation of the prohibition against coerced confessions but rather a violation of the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Solicitor General, in his *Amicus* Brief in *Sykes*, argued that there was a significant distinction between that case, where there was "no claim that the confession was involuntary and no suggestion that an innocent man may have been convicted" (*Amicus* Brief at 19) and the cases of *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Fay v. Noia*, 372 U.S. 391 (1963) where the rights involved "cut directly to the heart of the fairness of the trial proceedings." (*Amicus* Brief at 15.)

Respondent Bell submits that there is merit to the distinc-

tion which the Solicitor General drew in *Davis* and *Sykes*, even though the United States has taken a different position in the case at bar. In each of the cases from *Davis* to *Sykes*, the rights involved were not "fundamental." Indeed, in *Sykes*, Mr. Justice Stevens, is in his concurring opinion, observed that "there is clearly no basis for claiming that the trial violated any standard of fundamental fairness." *Id.* at 97. In none of those cases did the issue have a "bearing on the basic justice of his incarceration," *Stone v. Powell*, 428 U.S. 465, 491, n. 31 (1976), or the guilt/innocence determining process.

Here, the error related to the burden of proof upon the major issue under which the jury was to determine guilt or innocence. A proper instruction upon the burden of proof is fundamental to the truth-finding function of the jury. *e.g., Ivan v. New York*, 407 U.S. 203 (1972); *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Consequently, the procedural default rule of *Sykes* should not apply.

Though the appropriateness of applying a constitutional plain error rule has not been decided by this Court, at least there Justices have indicated that such a standard might be appropriate. *Wainwright v. Sykes, supra* at 95 and 99 (Stevens, J., concurring and White, J., concurring); *Estelle v. Williams, supra* at 514, n. 2 (Powell, J., concurring). Such an approach would be consistent with this Court's power to review plain errors which were not challenged in the courts below if necessary to prevent "fundamental unfairness." *Wood v. Georgia,* U.S. , *49 U.S. L.W. 4218, 4219, n. 5 (1981). See also* Supreme Court Rule 34.1(a).

This plain error standard has been recognized by the lower courts in habeas corpus proceedings. *E.g., Carr v. Alabama*, 586 F. 2d 462, 465 (5th Cir. 1978). *See Williams v. Zahradnick*, 632 F. 2d 353, 360 (4th Cir. 1980). For

example, *Berrier v. Egeler*, 428 F. Supp. 750 (E.D. Mich. 1976), *aff'd* 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 95 (1978), involved an unobjected-to erroneous jury instruction on the issue of self-defense. The District Court found the shifting of the burden of proof to be "plain constitutional error." 428 F. Supp. at 752. On appeal the Sixth Circuit reviewed the issue under "plain error" precisely because the claim touched upon "the central issue of guilt or innocence." 583 F. 2d at 522.

This seems to be the very point Judge Celebrezze made in the panel decision below:

> "...denying to a defendant a trial under what the Ohio Supreme Court has concluded to be the proper allocation of the burden of proof amounts to a denial of due process." 646 F. 2d at 1129 (A. 34).

If a constitutional plain error standard is applied then a number of factors coalesce to indicate that this is a proper case to grant relief. First, the right to have the state prove guilt beyond a reasonable doubt and not to be required to prove one's innocence is a fundamental right of the highest order. *E.g., In re Winship, supra,* and *Hankerson v. North Carolina, supra*. Second, the error here directly affected the jury's ability to accurately determine whether the accused was innocent or guilty. Third, the error is shifting the burden of proof was one of commission and not simply ommission. *Compare Sandstrom v. Montana, supra* with *Henderson v. Kibbe*, 431 U.S. 145 (1977). Fourth, the State of Ohio, by statute, had specifically placed upon the trial court the duty of giving proper instructions to the jury. See R.C. 2945.11. Fifth, there was no conceivable benefit to the defendants in not objecting to the jury instructions. With all these factors combined, if there is no "plain constitutional error" here, then none can ever be said to exist.

2. Petitioner Perini's Failure to Create a Record and Waiver of the Sykes Defense

a. The Record is Inadequate to Support a Sykes Defense.

Rule 5 of the Rules Governing Section 2254 cases states:

> ". . . There *shall* be attached to the answer such portions of the transcript as the answering party deems relevant." (Emphasis added.)

Mr. Perini failed to make any portion of the transcript of Mr. Bell's trial a part of the record in the District Court. (Decision of District Court, A. 51, n. 3; Pets.' Brief at 6, n. 4.) Consequently, there is nothing in the record to demonstrate Petitioners' claim that Respondent Bell's trial counsel failed to object to the improper jury instruction.

Each party to an action bears the burden of making a proper record to support its claim. *E.g., Thompson v. Gaffney*, 540 F. 2d 251 (6th Cir. 1976). As the Eighth Circuit has concluded:

> "The burden of pleading and proving waiver of these constitutional claims falls on the government. (Citations omitted) Because a finding of waiver bars even a meritorious claim for habeas corpus relief, the government's burden is a heavy one." *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974).

Accord, In re Kravitz, 488 F. Supp. 38, 46 (M.D. Pa. 1979) (burden on custodian to make record on claimed procedural default).

Further, a reviewing court should not pass upon issues for which there is no support in the record. *See, e.g., Johnson v. Henderson*, 509 F. 2d 121, 122 (5th Cir. 1975). The Ninth Circuit has emphasized that "(a)n allegation in an appellate brief does not substitute for the necessary pleadings in a Section

2254 proceeding." *Wacht v. Cardwell*, 604 F. 2d 1245, 1247 (9th Cir. 1979). Nor can Appellate Rule 10(e) be utilized to submit documentary materials to the Court of Appeals which were not made part of the record in the District Court. *E.g., United States, ex rel. Kellogg v. McBee*, 452 F. 2d 134 (7th Cir. 1971); *Collins v. Wilson*, 368 F. 2d 995, 997 (9th Cir. 1966).

Having failed to support his factual predicate for his *Sykes* defense, Mr. Perini is barred from asserting that claim.

b. Waiver of the Sykes Defense

As set forth in the Statement of the Case, the *Sykes* claim was never raised in the District Court and was raised for the first time in Mr. Perini's Answer Brief in the Sixth Circuit Court of Appeals. It is well-established that generally a reviewing court should not consider an issue not raised below. *E.g.., Singleton v. Wulff*, 428 U.S. 106, 120 (1976).[25] The Ninth Circuit explained the reason for the rule was that:

> ". . . It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below." *Partenweederei, Ms. Belgrano v. Weigel*, 313 F. 2d 423, 425 (9th Cir. 1962).

It is clear that this rule applies to the Government as well as to habeas corpus petitioners. *E.g., Robinson v. Berman*, 594 F. 2d 1, 3 (1st Cir. 1979); *Hopkins v. Jarvis*, 648 F. 2d 981, 983, n.

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[25]Obviously, this rule will allow for an exception in the case of a manifest injustice. For example, where a District Court ruling properly relies upon a state Supreme Court decision, the Circuit Court may reverse where the state Supreme Court ruling is overruled during the pendency of the appeal. *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

2 (5th Cir. 1981); and *Messelt v. State of Alabama*, 595 F. 2d 247 (5th Cir. 1979).

This view accords with the applicable rules of procedure. Rule 11 of the Rules Governing Section 2254 proceedings incorporates the Federal Rules of Civil Procedure where applicable and not inconsistent. Rule 8(c) of the Federal Rules of Civil Procedure requires that the answering party "shall set forth affirmatively" all affirmative defenses, including the defense of "waiver". The failure to so plead is considered a bar to the right to assert the defense. See *West's* Federal Practice Manual, Section 7975 (1979).[26]

Recent decisions by this Court also support this view. For example, in *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court refused to consider a *Sykes* claim where the respondent failed to raise it in either the district court or the court of appeals. This refusal was based upon considerations of "judicial efficiency" since a determination of *Sykes* issues may turn upon factual findings on questions of state law, *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980).

In *Estelle v. Smith*, ____ U.S. ____, 68 L. Ed. 2d 359, 372, n. 12 (1981), this Court rejected the government's attempt to raise the claims where it was first raised in a motion for new trial before the District Court. In so doing, this Court adopted the reasoning of the Fifth Circuit, which included the following:

> "(I)n the habeas proceeding in federal district court, the state did not raise this argument in the pleading or at any time until it moved for a new trial. Judge Porter held that this constituted a waiver, see *Smith v. Estelle*, 445 F. Supp. 647, 659 (N.D. Tex. 1977), and we are not disposed to disagree." *Smith v. Estelle*, 602 F. 2d 694, 708, n. 19 (5th Cir. 1979).

[26] Appellate courts generally will not consider even claims raised for the first time in a reply brief in the District Court. *See e.g., Jennings v. Casscles*, 568 F. 2d 229, 233-34 (2nd Cir. 1977); and *McKinney v. Wainwright*, 488 F. 2d 28, 29, n. 1 (5th Cir. 1974). *See also Reinhart v. Brewer*, 561 F. 2d 126, 129 (8th Cir. 1977).

These principles apply *a fortiori* in Mr. Bell's case and should bar an application of *Sykes* to his case.

3. The Inadequacy of the State Grounds

The existence of a state "contemporaneous objection rule" does not, in and of itself, preclude consideration of an unobjected-to error under *Sykes*. Rather, a determination must be made as to the "adequacy" of the asserted state grounds. *Sykes, supra* at 78-79. In resolving that question in *Sykes*, the Court cited *Henry v. Mississippi*, 379 U.S. 443 (1965) for the proposition that a state procedural rule could be an adequate and independent state ground only if "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.* at 83, n. 8. *See also Ulster County Court v. Allen*, 442 U.S. 140 (1979).

The "adequacy" of the alleged independent ground is a matter of federal law. *E.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458 (1958); *Sykes, supra* at 88. Further, the inquiry into the adequacy of the state grounds must be made on an individual basis:

> "In *every case* we must inquie whether the enforcement of a procedural forfeiture serves such a state interest." *Henry, supra* at 447. (Emphasis added)

This requirement has been followed by the post-*Sykes* decisions of the lower courts:

> ". . . our cases make it clear that we cannot simply consider the (contemporaneous objection) rule in general, or in the abstract; we must see how it operates in the particular case before us." *Jurek v. Estelle*, 593 F. 2d 672, 683 (5th Cir. 1979) (Footnote omitted)

Application of these principles to the case at bar indicates that there are two separate and independent reasons why the state's

interest in these cases is inadequate to legitimize the preclusion of these claims from consideration by the federal courts.

FIRST. The State cannot "avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support." *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). *See also Williams v. Georgia*, 349 U.S. 375 (1955).

In this case, as in *Williams, supra*, Ohio has sought to establish a bar to federal review where its own courts are not barred from considering the issue. In *Williams*, this Court dealt with the Georgia Courts' refusal to hear an extraordinary motion for new trial. The issue sought to be raised by that motion had *not* been raised on direct review. Nonetheless, because this Court found that Georgia appellate courts had, in the past, heard "kindred issues raised in the same manner" (*Williams* at 383), the Court determined that it, too, had the jurisdiction to consider the substantive issue.

This type of analysis most recently used by the Court in *Ulster County, supra*, attests to the continuing vitality of *Williams*. The *Williams* analysis is applicable to this case even though *Williams* was on direct review. Whether a case is on direct or collateral review, the initial question must always be whether an independent and adequate state ground forecloses federal consideration of the claim.

In *Williams*, the Court focused, through an analysis of Georgia appellate cases,[27] on situations where the courts had granted review. These decisions revealed two common factors. First, in each instance, although presenting different substantive issues, the error was covered by a "contemporaneous

[27]It is interesting to note that *Williams* was concerned with the power of Georgia *Appellate* Courts to consider the substantive issue. The question was whether any Georgia court had exercised the discretionary power. *See Williams, supra* at 384-388.

objection rule." *Williams* at 384-388. Thus, the State's interest in mandating compliance with this procedural rule was the same. Second, the decisions revealed that the Georgia courts "possessed the power" to grant the motions in each instance. This Court reasoned that if the same interests existed in all of the cases and the state courts had the same power in each case, then "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." *Williams* at 388.[28]

In the case at bar, the Ohio courts have the same type of "discretionary power" through Ohio Criminal Rule 52(B), the "plain error" rule. Under this rule, Ohio courts are empowered to consider errors which were not objected to at trial if those errors affect "substantial rights." This is the primary vehicle to raise substantial issues where there has been no objection.[29]

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[28]An ostensibly similar situation to *Williams, supra* was presented in *Wolfe v. North Carolina*, 346 U.S. 177 (1960). The Court in *Wolfe, citing Williams with approval*, was concerned with the North Carolina Supreme Court's discretion to expand the record before it so as to include material which either party had neglected to transmit for review. In determining whether North Carolina courts had exercised this discretionary power, the Court found that those courts "had consistently and repeatedly held (they) would not make independent inquiry to determine the adequacy of the record before (them) . . ." *Wolfe, supra* at 188. This decision factually distinguished *Williams* by finding that the North Carolina Courts, though possessed with a discretionary power, had *never* exercised that power. In *Williams*, however, Georgia Appellate Courts *had* exercised that discretionary power. Likewise, *Wolfe* does not foreclose inquiry in this case. As established, *infra*, Ohio courts have determined not only that plain error is an available means for review, but that plain error exists in several different settings. Thus, *Williams* continues to be the primary focus for analysis.

[29]The appeals process and the motion for new trial are applicable to errors occurring on the record. Each of these means, however, gives Ohio courts the discretion to hear matters which affect substantial rights, despite the observance of an objection.

In *State v. Long*, 53 Ohio St. 2d 91, 372 N.E. 2d 804 (1978), the Ohio Supreme Court invoked a plain error analysis on precisely the same substantive and procedural questions presented here. The Court did not say that plain error review was unavailable. It simply found that on the facts presented there, the outcome of the trial clearly would not have been otherwise. *Long, supra* at 97. Thus, the Court recognized its discretionary power to review an unobjected-to error but declined to find such error on the facts presented.

Other Ohio Appellate courts have, however, utilized plain error to reach the substantive issue despite a procedural default. In *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1278 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); *State v. Gideons*, 52 Ohio App. 2d 70, 368 N.E. 2d 67 (1977); and *State v. Muscatello*, 57 Ohio App. 2d 231, 378 N.E. 2d 627, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 738 (1978), plain error was used to reach the merits. All three of these reported cases dealt with jury instructions. Thus, each case implicated the same contemporaneous objection interest as manifested here. Yet all three courts found they had the discretion to overlook that interest and indeed exercised that discretion. Similar situations can be found in *State v. Patton*, No. 35579 (8th Dist. Ohio Ct. App., March 3, 1977); *State v. Ballard*, No. 36204 (8th Dist. Ohio Ct. App., May 26, 1977); *State v. Davis*, No. 36142 (8th Dist. Ohio Ct. App., May 5, 1977); *State v. Burke*, No. 354 (4th Dist. Ohio Ct. App., January 30, 1978) (Addendum at 82, 24, 43, and 29, respectively).

These cases demonstrate that in situations involving the same state interest under Criminal Rule 30, Ohio courts have not hesitated to utilize plain error to grant relief. It is evident that the Ohio courts *have* not only had the discretion to review such errors but that they have utilized it. As in *Williams*, it is clear that Ohio courts have exercised plain error "in a proper case."

Various federal courts have recognized this concept and have looked to whether the particular state could utilize a discretionary means of review to reach unobjected-to claims. In *Berrier*, the Court was faced with a burden-shifting instruction on self-defense which had not been objected to. The Court found that the substantive issue could be reached since Michigan had a rule whereby issues of "fundamental injustice" could be considered without an objection. *Berrier, supra* at 522. *See also Krzeminski v. Perini*, 614 F. 2d 121, 123 (6th Cir. 1980) (treating Ohio's "plain error" rule).

The same result was reached in *Harless v. Anderson*, 504 F. Supp. 1135 (E.D. Mich. 1981). There the Court was again concerned with a burden-shifting instruction which had not been objected to. The Court reached the issue on the basis of Michigan's "manifest injustice" rule, CR G (1963) 516-2. The Court held:

> "If the State itself does not require a contemporaneous objection to preserve the issue on appeal, the federal court will not require such an objection." *Harless* at 1138-39.

See also Mitchell v. Smith, 633 F. 2d 1009, 1011 (2nd Cir. 1980):

> "When the State fails to give preclusive effect to their own procedural rules, comity concerns do not require that the federal courts give greater respect to their rules than State's themselves."

Accord, Quigg v. Crist, 616 F. 2d 1107, 1111, n. 4 (4th Cir. 1980); *Carr v. Alabama*, 586 F. 2d 462 (5th Cir. 1978); and *Wallace v. McKenzie*, 449 F. Supp. 802, 806-7 (S.D. W. Va. 1978).

Since the Ohio courts in this case could have exercised their discretion to consider the substantive issue *despite* the procedural default, the federal courts should be able to do no less. This same jurisdiction was used in *Ulster County v. Allen*,

supra. In *Ulster County*, the Court was concerned with whether New York had a contemporaneous objection rule which would bar federal review of the unobjected-to presumption. The Court's analysis dwelt on whether the New York courts could consider such an issue despite the absence of an objection. The Court found that the New York courts had the *discretion* "to consider and determine any question . . . which may have adversely affected the appellant *even if not previously objected to*." *Id*. at 150, n. 8 (emphasis added). Furthermore, the Court found that even if New York had a contemporaneous objection rule, the Court of Appeals had developed a judicial policy of reviewing "unobjected-to errors that affect a fundamental constitutional right." *Id*. at 151, n. 10. Considering the lessened effect New york had given its rule, the Court held:

> "But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *Id*. at 154.

Since Ohio has not interpreted Criminal Rule 30 to be an absolute bar to review, this Court has the power to do the same and may consider the substance of Respondent's claim.

SECOND. All contemporaneous objection rules are not created equal. The varying interests of both the state and the defendant in any given situation may result in a different judgment as to the "adequacy" of the asserted state grounds for preclusion. For example, the State's interest in requiring objections and maintaining finality is probably the greatest in situations involving guilty pleas. Generally such cases are not as carefully prepared as cases which actually go to trial; it will be difficult to find witnesses after time has transpired; and there will be no transcript of testimony of unavailable witnesses which can be utilized at any subsequent trial as allowed under

Ohio v. Roberts, 448 U.S. 56 (1980). See Westin, "Forfeiture of Constitutional Rights," 75 Mich. L. Rev. 1214, 1237-49 (1977). Nevertheless, guilty pleas are subject to collateral attack because of the fundamental nature of the rights involved.

Like the guilty plea example, the right involved here is a fundamental one. In contrast to the grand jury example, *e.g. Davis v. United States, supra*; and *Francis v. Henderson, supra*, the Respondents here had everything to lose and nothing to gain by "withholding" an objection to the jury instruction. No possible tactical advantage could have been gained by defense counsel's failure to object here or by accepting a higher burden of proof than that required by law. No allegation has been made that any trial counsel even considered the possibility of raising any objection to the jury instruction, let alone that they improperly withheld the objection.[30] To the contrary, counsel for the Petitioners has specifically admitted that no such improper motives should be attributed to trial counsel:

> "To say that Ohio *counsel* and courts had a *justifiable reliance* on past precedent would be an understatement at best." (Petitioner Engle's Petition for Re-hearing *En Banc* in the Sixth Circuit, pp. 4-5) (emphasis added).

Thus, both the fundamental nature of the right involved and the total lack of any conceivable tactical advantage places Respondents' interest in federal habeas corpus review in its highest position.

In contrast, the interests of the state which might, in other circumstances, support a rule of preclusion are not applicable here. The interest of the state in enforcing a contemporaneous objection rule at trial generally fits into three categories: (1) insuring the timely taking of testimony on issues of fact, pri-

[30]If such an allegation had been properly raised, then an evidentiary hearing in the Federal District Court should have been held. *See Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980); and *Henry v. Mississippi, supra* at 450.

marily relating to the suppression of evidence; (2) preventing "sand-bagging" by trial counsel so as to insure that the trial is the "main event" of the criminal proceedings; and (3) "finality", creating incentive to have a trial that is as error free as possible so as to avoid the necessity of having new trials. See Pets.' Brief at 9; Solicitor General's *Amicus* Brief at 14-15. *See also State v. Childs*, 14 Ohio St. 2d 56, 62, 236 N.E. 2d 545, 549 (1968); and *State v. Williams*, 51 Ohio St. 2d 112, 117, 346 N.E. 2d 1364 (1977), vacated in part on other grounds, *Williams v. Ohio*, 439 U.S. 955 (1978).

The first interest, insuring the timely taking of testimony with respect to preliminary matters such as suppression motions, *e.g., Wainwright v. Sykes, supra*, has no application here at all because the error relates to an erroneous jury instruction. The second interest, in avoiding sand-bagging by trial counsel, appears to be the major concern articulated by the Ohio Courts. *E.g., State v. Childs, supra* and *State v. Williams, supra*. But, upon the facts of these cases, there is no suggestion that counsel could have obtained any tactical advantage by accepting the burden of proof upon the affirmative defense or by "holding" an objective in reserve. Further, given the admission by Petitioners' counsel in the Circuit Court below that any failue to object could have been based upon "justifiable reliance" upon past precedent, it is apparent that this interest is not implicated in the cases at bar.

The third interest, finality, must be examined in the context of the state interest in avoiding retrials. It is evident that the State of Ohio has not sought to create an absolute bar since it allows review of unobjected-to errors upon a plain error standard. Ohio Criminal Rule 52. Equally as important is the statement of the Ohio Supreme Court in *State v. Williams, supra*, indicating that the failure to object would preclude review where:

> ". . . a party complaining of the trial court's judgment *could have called*, but did not call, to the trial court's attention (the error) at a time when such error could have been *avoided or corrected* by the trial court." *Id.* at 117 (citations omitted) (emphasis added).

As developed below in the arguments concerning inadvertence and futility, Ohio trial counsel could not realistically have called the error to the trial court's attention and, even if they had, the trial courts could not reasonably have avoided or corrected the pre-*Robinson* error. Consequently, by its own criteria, the interest of the state is not served here.

This point is made by the only Ohio Court to specifically consider the State's interest in enforcing its contemporaneous objection rule in pre-*Robinson* cases:

> ". . . Rule 30 . . . contemplates calculated risks and tactical choices, and at the same time, guards against nonfeasance and misfeasance. In fact, the rule prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." *State v. Hamilton*, No. 5088 (2nd Dist. Ohio Ct. App., December 9, 1976) at 3 (Addendum at 48, 50) (emphasis added.)

A similar conclusion was reached by the panel decision outlined by Senior Judge Peck in *Isaac v. Engle, supra* at 1126 (A. 30). Given the fact that this conclusion is based upon an interpretation of State law, the decision of the Court of Appeals on this issue may be entitled to preferential consideration. *See* Respondent Hughes' Brief on this point at 16-17.

It is important to emphasize that in the case at bar, unlike the *Davis/Sykes* line of cases, there was no tactical advantage to be gained by withholding the objection and accepting the burden of

proof upon the self-defense issue. Without such an incentive, "it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed." Friendly, "Is Innocence Irrelevant . . . .", 38 U. Chi. L. Rev. 142, 158 (1970). In Ohio even a defendant who must seek vindication from the Ohio Supreme Court can reasonably expect a decision within two years of incarceration. *E.g., State v. Harris*, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979); *State v. Sturm*, 66 Ohio St. 2d 483, ____ N.E. 2d ____ (1981). In Mr. Bell's case six years have now passed and he still has not obtained his freedom. The delay caused by having to pursue federal remedies was so great that both Mr. Hughes and Mr. Isaac have full releases from the state of Ohio even though the litigation continues. Nor are their experiences unique. *E.g., Jones v. Jago*, 428 F. Supp. 405 (N.D. Ohio 1977), *aff'd*, 375 F. 2d 1164 (6th Cir. 1978), *cert. denied* 439 U.S. 883 (1978) (incarceration for over six years).

This prospect of years of additional incarceration gives both the accused and counsel incentive of the greatest possible magnitude to present such claims to the state courts at the earliest opportunity. It insures that the trial will be the "main event" and gives more than adequate protection to the state's interest inducing counsel to attempt to reform the law and to aid the trial court in attempting to produce error-free trials. Any further "sanction" within the context of the case at bar would not only be unnecessary but also grossly disproportionate to the alleged "offense" against the State's procedural rule. Since the State's articulated interest in invoking the contemporaneous objection rule is already adequately protected, *Sykes* has no application here.

B. Application of the Contemporaneous Objection Rule to these Cases would violate Procedural Due Process, Substantive Due Process and Equal Protection

1. Procedural Due Process

It is well established that the "state action" requirements of both the Fourteenth Amendment are met even if that action is taken through the state judicial branch. *E.g., Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Fundamental fairness guaranteed by procedural due process, requires that:

> "In all instances the state must adhere to previousy declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken." Nowak, Rotunda & Young, HANDBOOK ON CONSTITUTIONAL LAW 477 (1978) (emphasis added).

It is conceded that the instructions in these cases erroneously required the respective Respondents to prove that they had acted in lawful self-defense. If the Solicitor General of the United States is correct in his assertion that the right accrued solely from the passage of the statute and not from a change effected by *State v. Robinson, supra*, then procedural due process was violated.

Under this view, the statute — pertaining to the important question of the quantum of proof — was one of the "previously declared rules" which the state must adhere to in adjudicating the claim that these Respondents violated Ohio's criminal statutes. Yet, the instructions to the jury changed the rules; altered the quantum of proof; and thereby prejudiced the accused.

It is quite clear that this action could not have been taken by the legislature, since it would violate the *ex post facto* clause. *E.g., State v. Jones, supra*. The same protection is afforded against such judicial actions by the due process clause. *See* Tribe, *American Constitutional Law* 478 (1978).

2. Substantive Due Process

Fourteenth Amendment due process prohibits state action that is "arbitrary" or "capricious." Stated in other terms, the due process clause requires that state action "have a rational relationship to a legitimate end of government." Nowak, Rotunda & Young, *supra* at 404. As developed in more detail below, *none* of the legitimate interests a state may have are furthered by invocation of the contemporaneous objection rule in the cases at bar. See *Isaac, supra* at 1126 (panel decision); *Isaac, supra* at 1136-37 (Jones J., concurring). This same conclusion was reached by the Ohio Court of Appeals in *State v. Hamilton*, No. 5088 (2nd Dist.Ct. App., December 9, 1976), at 3, in finding that Rule 30

> ". . . prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added) (Addendum at 50).

Accordingly, the application of Ohio Criminal Rule 30 to any of the cases at bar is not in furtherance of any legitimate state interest and violative of the due process clause of the Fourteenth Amendment.

3. Equal Protection

The Fourteenth Amendment also guarantees equal protection of the law. While the state may create classifications, such classification must be rationally related to the furtherance of some permissible state objection. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). Moreover, when such classification in-

fringes upon a fundamental right, it can be justified only upon a showing of a compelling state interest. *See Shapiro v. Thompson, supra*.

In the interim between *Robinson* and *Humphries*, some defendants whose counsel had *not* objected to the jury instructions nevertheless received new trials. It can be documented that at least five individuals who made no objection at trial but assigned the burden of proof issue as an error on appeal were granted new trials under Ohio's plan error rule.[31] In at least two other cases, the accused obtained leave to file supplemental briefs in the State Court of Appeals raising the claim that the instruction on self-defense had been erroneous and obtained new trials in spite of their failure to object.[32] In *State v. Patton*, No. 35579 (8th Dist. Ct. App., March 3, 1977) (Addendum at 82), the accused received a new trial even though he failed both to object at trial and assign the burden of proof issue on self-defense as error on appeal. This was the result of the Court of

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[31]*State v. Hamilton, supra* (self-defense); *State v. Davis*, No. 36142 (8th Dist. Ct. App., May 5, 1977) (self-defense) (Addendum 43); *State v. Hudson*, No. 35562 (8th Dist. Ct. App., May 17, 1977) (intoxication) (Addendum 56); *State v. Muscatello*, 57 Ohio App. 2d 273, 378 N.E. 2d 738, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 627 (1978) (mansslaughter); and *State v. Gideon, supra* (self-defense).

It is significant to note that in the *Muscatello* case the error was premised on this Court's decision in *Mullaney v. Wilbur, supra*. Even though *Mullaney* was decided on June 9, 1975, the trial in *Muscatello* did not occur until June 23, 1975 (57 Ohio Ap. 2d at 232; 387 N.E. 2d at 631). The state interposed the defense that the accused failed to object. The Court of Appeals found plain error and apparently determined that it was not signigicant that *Mullaney* was decided prior to the date of the trial. The Ohio Supreme Court affirmed this decision without speaking to either of those points.

[32]*State v. Ballard*, No. 36204 (8th Dist. Ct. App., May 26, 1977) (Addendum 24); and *State v. Rivera*, No. 35335 (8th Dist. Ct. App., January 20, 1977) (Addendum 93).

Appeals raising the issue *sua sponte* and finding it to be plain error. In *State v. Burke*, No. 354 (4th Dist. Ct. App., January 30, 1978) (Addendum at 29), involving an affirmative defense pertaining to the carrying of a concealed weapon, the court found reversible error even though there was no timely objection and even though the appellate decision was rendered after both *Robinson* and *Humphries*. Further, in *State v. Campbell*, No. C.A. 1763 (5th Dist. Ct. App., July 25, 1979) (Addendum at 36), another carrying a concealed weapons case, the Court found plain error in the absence of a failure to object on the burden of proof issue even though the trial itself occurred after both *Robinson* and *Humphries*.

The arbitrariness of Ohio's application of both its contemporaneous objection rule and its plain error rule can also be illustrated by other cases in which the plain error rule has been utilized to require a new trial. For example, the Ohio courts have found plain error where a prosecutor attempted to use the defendant's post-arrest silence for impeachment purposes. *State v. Eiding*, 57 Ohio App. 2d 111, 385 N.E. 2d 1332 (1978); where the jury was not specifically instructed on all the elements of the crime, *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1378 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); and where the prosecuting attorney made improper remarks in argument implying that if the accused were acquitted the pecuniary interest of the jury as taxpayers would be affected, *State v. Hill*, 52 Ohio App. 2d 393, 370 N.E. 2d 775 (1977).

As important as the rights in those cases were, they did not rise to the same magnitude as the shifting of the burden of proof upon an issue that makes the difference between guilt and innocence. It is irrational to recognize plain error in cases such as those set forth above, and to refuse to do so in cases in which the error goes directly to the heart of the truth-finding function of the jury such as Mr. Isaac's.

These cases serve to illustrate that the granting or denial of benefits under *Robinson* had nothing to do with the merits of any individual case and was not governed by any rational scheme. To the contrary, it was a "game of chance" in which some, who were lucky enough to be tried at a certain time or in a certain appellate district, were granted important benefits that were denied to others.

Having failed to meet the rational basis test, it necessarily follows that the state cannot show the compelling state interest required here because the fundamental right of liberty is implicated. Accordingly, the right to equal protection has been violated and the judgment of the Court below should be affirmed.

C. If *Sykes* Were Applied to the Cases at Bar, Respondents Are Within the "Cause" and "Prejudice Standards

1. "Cause or Prejudice"

Though the initial decisions by this Court on procedural defaults seemed to indicate that collateral review would be available only upon a showing of both cause *and* prejudice, there is language in this Court's opinion in *Sumner v. Mata*, ____ U.S. ____, 49 U.S.L.W. 4133, 4135 (1981) suggesting that review would be available if a showing was made of either cause *or* prejudice. Such an approach would be consistent with language in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), *quoted with approval* in *Davis v. United States*, 411 U.S. 233, 244 (1973) indicating that the degree of prejudice was one of the aspects to be considered in determining the existence of "cause." It would also be a separate method of applying a "constitutional plan error rule".

Hence, if *Sumner v. Mata* was intended to establish a

"cause" *or* "prejudice" test, then Mr. Bell submits that his unequivocal showing of prejudice alone should entitle him to relief.

2. Ineffectiveness as Cause

The change in Ohio's approach to the burden of proof may be viewed as having come from R.C. 2901.05 itself, *State v. Robinson, supra* at 110, 351 N.E. 2d at 93; *State v. Humphries, supra* at 101, 364 N.E. 2d at 1357, or from a "gloss" placed upon that statute by *Robinson*. *E.g., State v. Robinson, supra* at 116 (Corrigan, J., dissenting).

Since the right to effective assistance of counsel requires knowing the law, *e.g., People v. Iberra*, 386 P. 2d 478 (Cal. 1963) and that actions taken (or not taken) be a product of professional judgment rather than neglect or ignorance, *Marzullo v. Maryland*, 561 F. 2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978), it necessarily follows that any counsel who either was unaware of the statute's existence or misinterpreted its meaning was ineffective. *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977), Nor would insulation from such ineffectiveness come from the "usual practices" of the profession if such practice simply constituted "mass negligence." *E.g., The T.J. Hooper*, 60 F. 2d 737, 740 (2nd Cir. 1932). This is particularly true in a criminal case where, unlike civil matters, monetary damages cannot make the client whole.

Since ineffectiveness is "cause" under *Sykes, e.g., Sincox v. United States*, 571 F. 2d 876, 879-880 (5th Cir. 1978) and Pets.' Brief at 15, if the right in question is determined to have come from the statute itself then cause has been shown.

3. Futility as Cause

The state's primary interest in enforcing the contemporaneous objection rule is in creating error-free trials. It matters little, in terms of "finality" whether a new trial is the result of a decision by a state appellate court or a federal district court. Whatever the state's interest in having its own appellate courts consider possible errors, that interest is adequately protected by the exhaustion of state remedies requirement. Consequently, the question of whether "futility" can serve as cause under *Sykes* must be resolved by considering its effects upon the state's interest.

At the outset, it is important to emphasize that "futility" is a generic term for at least three different situations. The first of those situations is what Respondent Hughes has termed "futility in fact." (See Resp. Hughes' Brief at 15-21). This type of futility exists when counsel's making or not making an objection has no arguable bearing upon the prospects for avoiding error at trial.

Of course, it will usually be impossible to establish futility with such certitude. But the procedural default principle, like the exhaustion doctrine, is based upon comity. *Compare Sykes, supra* with *Fay v. Noia*, 372 U.S. 391, 418-420 (1963). Just as comity does not require vain acts for exhaustion purposes, neither should it require vain acts for procedural default purposes. In the exhaustion context, the mere "possibility" that a state remedy may be available is not enough to foreclose federal review when such a remedy has not been pursued. *E.g., Collins v. Perini*, 594 F. 2d 592, 593 (6th Cir. 1979) (post-conviction foreclosed by *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967)).

A similar standard is applicable to the comity requirements under the procedural default rule. Mere speculation as to the possible prevention of error at trial is not enough. Rather, if it

seems reasonably likely that any such objection would not serve this purpose, then "actual" or "practical" futility can be said to exist. A demonstration of "practical futility" would, like futility in fact, indicate both that enforcement of the procedural default rule was not legitimate and that cause existed. *E.g., Myers v. Washington*, 646 F. 2d 355 (9th Cir. 1981); *United States v. Frady*, 636 F. 2d 506, (D.C. Cir. 1980), *cert. granted* ___ U.S. ___, 49 U.S.L.W. 3962 (June 29, 1981).

A determination of whether it was, as a practical matter, futile to object in a given situation could be made by reference to objective indicia of futility. First, consideration should be given to whether the instruction in question was a "standard", well accepted one. This was true in the case at bar. See 4 *Ohio Jury Instructions*, Section 409.60.

Second, reference should be made to the treatment given to identical or similar objections by trial courts at the time. Here there are seven documented cases in which an objection was entered to jury instructions shifting the burden of proof to the accused on "affirmative defenses."[33] In each case the objection was overruled and the jury improperly instructed. One Ohio Appellate Court indicated that it knew of no pre-*Robinson* trial in which the jury had been properly instructed with respect to the burden of proof on affirmative defenses. *State v. Burke*, No. 354 (4th Dist. Ct. App., Pickaway Cty., January 30, 1978) at 7, n. 4 (Addendum 35).

[33]*E.g., State v. Robinson*, 48 Ohio App. 2d 197, 200, 356 N.E. 2d 725, 728 (1975), *aff'd* 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) (self-defense, Franklin County); *State v. Matthews*, 47 Ohio St. 2d 119, 351 N.E. 2d 98 (1976) (self-defense, Franklin County); *State v. Long*, 53 Ohio St. 2d 91, 94, 372 N.E. 2d 804, 806 (1978) (self-defense, Summit County); *State v. Slone*, 45 Ohio App. 2d 24, 29, 340 N.E. 2d 413, 418 (1975) (self-defense, Franklin County); *State v. Gideons*, 52 Ohio App. 2d 70, 76-77, 368 N.E. 2d 67, 70-71 (unclear whether proper objections — self-defense, Cuyahoga County); *State v. Johnson*, 11 O. Ops. 3rd 338, 340 (1978) (insanity, Cuyahoga County); *State v. Brewster*, 1 Ohio Ops. 3rd 372, 373 (1976) (self-defense, Franklin County).

Third, consideration should be given to the assessment of the existence of "futility" by those courts which are in the best position to judge the likelihood of an objection producing its desired effect. In the present cases, the Ohio Court of Appeals for the Second District has indicated that such an objection would have been a "vain act." *State v. Hamilton, supra* at 3 (Addendum at 50). An identical conclusion was reached in the panel decision authored by Senior Judge Peck below. *Isaac v. Engle, supra* at 1126 (A. 30).

Fourth. Since appellate courts may, institutionally, be more sensitive to change, their lack of receptiveness to a given legal argument may be an important indication of futility. In Ohio, decisions which conflict with the later Ohio Supreme Court decision in *Robinson* were rendered not only by four appellate courts[34] but also by the State Supreme Court itself. *State v. Rogers*, 43 Ohio St. 2d 28, 330 N.E. 2d 674 (1975), *cert. denied* 423 U.S. 1061 (1976).

These objective indicators all suggest that at the time of the trials of these three Respondents it would, as a practical matter, have been futile to make an objection. Hence, no legitimate state interest is furthered by precluding review of the merits of their habeas corpus claims.

There is, of course, a third type of futility that is the basis for much of the argument in the Solicitor General's brief. That aspect of futility focuses not upon factual or actual futility, but rather upon trial counsel's perception of such futility. The So-

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[34]*State v. Smith*, 49 Ohio App. 2d 388, 361 N.E. 2d 267 (1976) (3rd Dist., insanity); *State v. Jones*, 49 Ohio St. 2d 166, 359 N.E. 2d 1374 (1977) (indicating the Sixth District had incorrectly held the burden of proof could be placed on the accused); *State v. Ladany*, No. 7534 (9th Dist., January 22, 1975) (intoxication) (Addendum at 66); *State v. Morow*, No. 7757 (9th Dist., October 22, 1977) (self-defense) (Addendum at 77); *State v. Slone*, 45 Ohio App. 2d 24, 340 N.E. 2d 413 (1975) (10th Dist., self-defense).

licitor General argues against futility as cause when it is based upon a *judgment* by counsel that it would be futile to raise any such objection.[35] Of course, such an argument is not pertinent to the instant cases, since there is nothing in the record to suggest that any alleged procedural default was based upon the type of decision-making posited by the Solicitor General. *See* note 30, *supra*.

4. Inadvertence as Cause

While ineffectiveness will always be cause, cause can be established short of proving ineffectiveness. Because lack of effective assistance of counsel provides an independent basis for obtaining relief, to "closely equate" (Pets.' Brief at 15) cause and ineffectiveness would be to render *Sykes* a nullity. *Jurek v. Estelle*, 593 F. 2d 672, 683, n. 19 (5th Cir, 1979). Contrary to the claims of the Solicitor General, this does not call for a return to the "deliberate bypass" rule. Rather, it serves to implement the decisions of this Court from *Davis* to *Sykes* which indicate that the contemporaneous objection rule will be given preclusive effect when the failure to object was based upon a tactical or strategic decision made at trial. Indeed, the lower courts have generally applied *Sykes* by distinguishing between situations where the failure to object was a product of tactics and those situations where it was a result of inadvertence

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[35]One by-product of rejecting as cause counsel's reasonable determination that raising an issue would have been futile would be to give incentive to counsel to raise all conceivable errors, no matter how tenuous, in order to protect against future developments in the law. *Myers v. Washington*, *supra*, at 360. This is not only counterproductive but "borders on the absurd." *United States v. Frady*, *supra* at 512 and 513, n. 17.

or neglect or impossibility.[36] This approach seems to have been approved in *Smith v. Estelle*, ____ U.S. ____, 49 U.S.L.W. 4490, 4493, n. 12 (1981) *aff'd* 602 F. 2d 694 (5th Cir. 1979).

Under this interpretation, one aspect of cause is the lack of a firm legal basis upon which to make the objection. *Myers v. Washington, supra* at 359-360; *United States v. Frady, supra* at 512. This Court held that the mere theoretical possibility of obtaining reversal on appeal is not sufficient to require an objection:

> ". . . a failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966).

The lack of an adequate legal basis upon which to make such an objection was set forth in detail in the panel decision in *Isaac v. Engle, supra* at 1126 (A. 29-30). In addition to the factors set forth there, consideration should also be given to the following: (1) the then new statute was "not free of ambiguity", *Isaac, supra* at 1131 (A. 2) and, unlike statutes in other states, did not "expressly" require the prosecution to negate affirmative defenses. *Muscatello, supra* 57 Ohio App. 2d at 249, 387 N.E. 2d at 640; (2) unlike the 1971 Legislative Committee Report cited in *Robinson, supra*, 47 Ohio St. 2d at 110-111, n. 10, 351 N.E. 2d at 93-94, n. 10, the 1974 Committee Notes to R.C. 2901.05 make no reference to a change in the burden of proof; (3) an

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[36] *E.g., Jiminez v. Estelle*, 557 F. 2d 506 (5th Cir. 1977) (counsel ignored grounds for objection or did not comprehend their importance); *Sincox v. United States*, 571 F. 2d 876 (5th Cir. 1978) (ineffectiveness); *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979) ("attorney misfeasance"); *Collins v. Auger*, 577 F. 2d 1107 (8th Cir. 1978), *cert. denied* 439 U.S. 1133 (lack of knowledge of facts or law); *Graham v. Maryland*, 454 F. Supp. 643 (D. Md. 1978) (non-tactical explanation for failure to object); and *Tolliver v. Wyrick*, 469 F. Supp. 583 (W.D. Mo. 1979) (lack of knowledge of necessity for multiple objections).

article on the legislative history of the bill enacting the statute in question, authored by its two co-sponsors, gives no indication of any such change, Norris and Lehman, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974); and (4) the only pre-*Robinson* article treating this issue concludes that the burden of proof on affirmative defenses remained on the defendant, Comment, "Affirmative Defenses in Ohio After *Mullaney v. Wilbur*," 36 Ohio St. L. J. 828, 829-830 (1975).

Counsel for Petitioner Perini perhaps summed this situation up best when he indicated that "(i)n a real sense" the decision in *Robinson* "was not foreshadowed either by the terms of O.R.C. Section 2901.05 nor interim decisions of the Ohio Supreme Court." (Cert. Pet. at 8.) Relevant to the questions of both inadvertence and futility is the statement of Petitioner Engle that:

> "The decision in Robinson was a *clear break* with practice in Ohio and was not foreshadowed so as to make its result inevitable . . . . *To say that Ohio counsel and courts had a justifiable reliance on past precedent would be an understatement at best*." Petition for Rehearing En Banc in Sixth Circuit at 4-5 (emphasis added).

It was for reasons such as these that the Second District Ohio Court of Appeals concluded that the failure to object to an improper jury instruction prior to *Robinson* was "not based upon nonfeasance, misfeasance, or any tactical choice." *State v. Hamilton*, No. 5088 (2nd Dist. Ct. App., Dec. 24, 1976) (Addendum at 53).

What the Petitioners seek here is to set a higher standard of legal scholarship for the practicing bar than the Ohio Courts exercised when acting in their official capacity. In effect, the State of Ohio faulted trial counsel, and made clients suffer for that fault, when trial counsel either made no error, or, at the very

least, did nothing more than make the very same mistake that the State Supreme Court had made in *Rogers*.

Consequently, any failure to object to a jury instruction prior to *Robinson* was not the product of a strategic or tactical choice. Indeed, it was not the product of any choice at all. Rather, it was based upon a lack of information upon which to base the objection and constituted "cause" under *Sykes*.

5. Prejudice

The second prong of the *Sykes* test is "prejudice." As developed fully in the preceding discussions concerning the constitutional magnitude of the error and the doctrine of constitutional plain error, there can be no question that the error here was prejudicial. Whether the burden of proof standard was adopted by the State as a matter of state law or of constitutional requirement, the fact remains that the jury was misinformed as to the burden of proof upon the crucial matter which made the difference between guilt and innocence. Both the Ohio Supreme Court and the Federal Circuit Courts have recognized that such an error is prejudicial. *E.g.*, *State v. Chase*, 55 Ohio St. 2d 237, 243, 378 N.E. 2d 1064, 1068 (1978) and *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955 (1978). To suggest that no prejudice occurred in Mr. Bell's case is to blink at reality.

CONCLUSION

In the cases at bar, the jury was given improper instructions which shifted the burden of proof upon the major factual issue in dispute: self-defense. The "fault" for this error may lie with a number of individuals: perhaps the Legislature itself was at fault for not making its statute so clear that courts would not misun-

derstand their meaning; perhaps the Legislative Committee was at fault for failing to indicate in the notes to the code that this was a change when the new criminal code was enacted in 1974; perhaps the Ohio Judicial Conference was at fault for failing to revise their model jury instructions to conform to the new code; and perhaps the Ohio Supreme Court itself was at fault for setting forth its *dictum* in *State v. Rogers, supra*, which was later contradicted by *State v. Robinson, supra*. But to whomever the "fault" is attributed, it is clear that the confusion and the error was caused by the State of Ohio, acting either through its Legislature or its Courts. This is true even at the time of the trial — for Ohio Revised Code Section 2945.11 specifically enjoined the Court to correctly charge the jury upon "all matters of law necessary . . . in giving its verdict . . . ."

In spite of the fact that the error here was created by the State and injected into the trial by the State, the State of Ohio insists that the unfair trials should stand. When stripped to its essence, the argument of the State is nothing more than a claim that they repeated the error so many times (and thereby possibly convicted so many innocent individuals) that they cannot conveniently correct the mistake. The answer to this type of argument was aptly set forth in a different context some 160 years ago:

> "Then where is the justice of the law, and where is its boasted humanity? And for what good and purpose is it, that the arm of the law should be lengthened to strike the fatal blow, but made too short to save an unfortunate victim who is unjustly doomed to suffer? It is enough to ask the question, and every heart will respond that it should not be so." *Bob v. State*, 10 Tenn. 173, 177 (1826) (Haywood, J.).

Fortunately, this Court, acting under its authority to enforce the Fourteenth Amendment has the power to insure that it shall "not be so," by affirming the decision of the *en banc* panel below.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

KATHLEEN S. AYNES
P.O. Box 143
Twinsburg, Ohio 44087
(216) 425-8200

Counsel for Respondent Bell

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No. 80-1430

In the Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

LINCOLN ISAAC, Respondent

E.P. PERINI, Superintendent, Marion Correctional Institution, Petitioner

v.

KENNETH L. BELL, Respondent

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

HOWARD HUGHES, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HUGHES

RICHARD L. AYNES
Counsel of Record
J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751
Counsel for Respondent Hughes

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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HOWARD HUGHES

STATEMENT OF THE CASE

Respondent Howard Hughes concurs with Petitioner Engle's Statement of the Case (Petitioners' Brief at 7-8)[1] with two exceptions. First, Superintendent Engle maintains that the prosecution objected to the giving of the charge upon self-defense. (Pets.

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1. All subsequent references to the Petitioners' Brief will be abbreviated as "Pet.'s Brief."

Brief at 7) However an examination of the very pages of the record cited by Petitioner Engle (Hughes' State Trial Transcript 288-289; Joint Appendix 42)[2] reveals that the State Prosecutor did not object to charging the jury upon that issue. Rather, the prosecutor accepted the fact that the jury was to be charged upon the self-defense issue and used that fact as a basis to argue that under state law the accused was not entitled to instructions upon the lesser included offenses of aggravated murder and voluntary manslaughter.[3]

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2. All subsequent references to these materials will be abbreviated as "H.T." and "J.A.". The Appendix to the Certiorari Petition will be referred to as "A."

3. Under Ohio law evidence supporting a complete defense to the crime charged may preclude the jury from considering lesser included offenses. See generally State v. Nolton, 19 Ohio St. 2d 133, 249 N.E. 2d 797 (1969). It was Nolton that the prosecutor in Mr. Hughes' case cited in his argument on the objections.

For an example of the application of this doctrine, see the decision of the State Court of Appeals in Respondent Bell's case. (J.A. 18-20).

Second, Petitioner Engle claims that "Hughes' counsel specifically requested the charge on self defense." (Emphasis added) (Pet.'s Brief at 7.) But for purposes of clarity it is important to note that what Mr. Hughes' trial counsel did was to request that the trial court "charge" the jury on "self-defense."[4] At no time in the proceeding did Mr. Hughes' counsel request "the" charge which was in fact given to the jury, nor did he propose that Mr. Hughes should bear the burden of proof on that issue. To the contrary, trial counsel indicated:

> "First of all, may I say for the record that I am going to object to the entire charge in its entirety, but for one purpose. We are operating now under a new code in which many things are

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4. ". . . I would like to have the Charge of the lesser included offenses of voluntary Manslaughter, Murder and Self-defense . . ." (H.T. 288; J.A. 42).

uncertain." (H.T. at 350; J.A. 48.)

(Emphasis added)[5]

At no stage in these proceedings has Mr. Hughes denied that there was sufficient evidence in the record to allow a properly instructed jury to return a verdict of guilty upon the issue of voluntary manslaughter. Likewise, Petitioner Engle has never denied that there was sufficient evidence presented at the trial to place the issue of self-defense properly before the jury. Both parties and the courts below have recognized that while detailed references to the record would allow arguments to be made, both pro and con, upon the question of guilt or innocence, such argument does little more than emphasize that this was a question for the jury. (See Pet.'s Reply Brief to Briefs in Opposition to Certiorari at 1.)

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[5]. Trial counsel's objection, when read in its entire context, seems to be directed toward other concerns. However, such a reading does not change the fact that trial counsel clearly stated "for the record" that he was objecting to the "entire charge in its entirety." (H.T. 350; J.A. 48.)

This being the case, it is unfortunate that the Amicus Curiae, United States, presents an inaccurate account of the evidence in Mr. Hughes' case.[6] (Brief of the United States 7 and 29, n. 31). A full examination of the evidence before the jury and the errors contained in the Magistrate's Report relied upon by the Solicitor General is set forth in "Petitioner [Respondent] Hughes' Memorandum on the Merits," pp. 4-13, docketed in the District Court on June 19, 1979.

At this stage in the proceedings it is sufficient to make six points in response to the Solicitor General's claims as to the status of

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6. In his statement of the case, the Solicitor General relies primarily upon the unfavorable Report and Recommendation of the Magistrate in the U. S. District Court. (J.A. 24-37.) It is significant to note that this Report was issued while Mr. Hughes was proceeding pro se and did not have the benefit of counsel to brief and argue his case. Mr. Hughes obtained counsel after the Report was issued but prior to the decision of the District Court. Counsel was able to point to no less than 11 major errors contained in that Report. See "Petitioner [Respondent] Hughes' Memorandum on the Merits" at 4-13 (docketed: 6/19/79). It is noteworthy that the District Court, while indicating it had considered the Report (A. 63), neither adopted the Report and Recommendation as its own nor incorporated any of the matters objected to in its own opinion.

the evidence in the record. First. The jury had before it evidence that Mr. Hughes was a respectable citizen and a contributing member of the community. He was a veteran of the United States Army who had served in the front lines in Korea for 16 months. (H.T. 242) During the course of that tour of duty, Mr. Hughes not only earned a combat infantry badge and a citation medal for service in Korea but also three bronze stars. (H.T. 242) At the end of service, he was honorably discharged from the Army, holding the rank of Corporal. (H.T. 243) He had no prior state or federal convictions (H.T. 276-277) and at the time of the incident had worked at the Chrysler Plant in Twinsburg, Ohio, for over 20 years. (H.T. 243)

Second. While it is true that there were seven witnesses to the shooting, any implication that these seven witneses testified that the shooting was not in self-defense is incorrect. One of those witnesses, whom the Solicitor General refers to as a "former girlfriend", did

not testify at all. A second witness, a minor child of the "former girlfriend", also did not testify. The only other adults present, Robert Logan and Minnie Jackson, both testified in the trial as defense witnesses and their testimony was consistent with Mr. Hughes' testimony that he acted in lawful self-defense. The other three witnesses--all minor children of the "former girlfriend"--did testify as witnesses for the prosecution. However, their testimony was open to question by the jury because of: (1) their ages; (2) their bias against Mr. Hughes because of past disagreements; and (3) the fact that the record indicates that one of them was being "signaled" from outside the courtroom while on the stand. See generally Mr. Hughes' District Court Memorandum, supra, at 4-13.

Third. It is true that the testimony before the jury indicated that Mr. Hughes had consumed some alcoholic beverages on the day in question. However, what the Solicitor General

fails to tell the Court is that the same testimony indicated that all of the adults present had been drinking and that the state's coroner testified that the deceased's blood-alcohol content was .14 milligrams--some 4 milligrams over the legal rate for driving while intoxicated. (H.T. 166-167)

Fourth. In claiming that the deceased attempted to shake hands with Mr. Hughes "as a gesture of friendship", the Solicitor General ignores the testimony of Robert Logan:

> "I'm telling the jury that the man walked toward Howard with his hand extended and what his intention was with the hand extended I couldn't say . . . ." (H.T. 240)

This account takes on added significance in light of Mr. Hughes' testimony, in another context, that the deceased was a larger man than he and that:

> "I couldn't let the man get a hold of me . . . ." (H.T. 264)

Equally as important, the initial recitation by the Solicitor General makes it sound as if Mr. Hughes shot the deceased when he had his hand extended. The second reference (Amicus Brief at 29, n. 31), states that the shooting occurred "immediately" thereafter. However, the record reveals that Mr. Hughes not only refused to allow the deceased to take hold of him, but that he attempted to break off all contact between them because he "turned his back and walked away." (H.T. 210; see also 218-219) It was only after that that Mr. Johnson initiated the actions which ultimately led to his death.

Fifth. The actions by the prosecutor, the trial judge, and the jury in the state trial court belie the claim made by the Solicitor General that self-defense was not properly in issue. The prosecutor did not object to the instruction upon self-defense. Rather, though he obviously did not want the jury to believe that the accused acted in self-defense, he seems

to have agreed that there was sufficient evidence to justify a self-defense instruction. (H.T. 288; J.A. 42). The trial court's indication that it would instruct upon self-defense was relatively cursory and seemed to indicate that there was no doubt in the Court's mind that such a charge was proper upon the facts before it. (H.T. 288; J.A. 42) If the charge was warranted when the defendant was erroneously required to "prove" self-defense, then it follows, a fortiori, that there was sufficient evidence to warrant the instruction when the defendant should only have had to "go forward" with evidence of self-defense.

Finally, the action of the jury--even though improperly instructed--has some bearing upon this question. If the evidence had indicated that this was the type of "cold-blooded" killing painted by the Solicitor General, then the jury would have returned a verdict of guilty upon the count of aggravated murder. The fact that the jury returned not

guilty verdicts upon both aggravated murder and murder indicates that the jury--having seen the witnesses and judged their credibility--rejected the interpretation placed upon the evidence by the Solicitor General.

Mr. Hughes submits that there can be no question but that self-defense was properly in issue. This being the case, this Court may properly consider the questions of whether the state violated Respondent Hughes' Fourteenth Amendment rights by requiring him to prove that he acted in lawful self-defense, and if so, whether the federal courts are powerless to correct an error of such magnitude.

ARGUMENT

In the interest of judicial economy and in order to avoid needless repetition, Respondent Hughes will limit his argument to those matters that are unique to his own case and, on issues of more general applicability, rely upon

the argument and legal analysis set forth in the Brief filed by Respondent Bell.

I.

The Effect of Trial Counsel's Objection to the Charge to the Jury

As set forth in the Statement of the Case, Respondent Hughes' trial counsel indicated that he was "going to object to the entire charge in its entirety . . ." (H.T. 350; J.A. 48-50) After a three-way discussion between the Court, the prosecutor, and trial counsel (H.T. 350-354; J.A. 48-50), the trial court made the following statement: "You may have your exception." (H.T. 354; J.A. 50)

These facts give rise to two possibilities. On the one hand, this Court may determine that the general objection to the "entire charge" constituted compliance with Ohio's contemporaneous objection rule--especially given the "exception" granted by the trial court and the trial court's failure to indicate that counsel

should be more specific in his objections. Obviously, if the Court adopted that view, then Mr. Hughes' trial counsel complied with the contemporaneous objection rule and there would be no occasion to consider the applicability of Wainwright v. Sykes, 433 U.S. 72 (1977).[7]

On the other hand, if this Court were to deem the objection insufficient, the fact that such an objection was made would nevertheless be relevant to the issues before the Court concerning the "adequacy" of the asserted independent state ground and the existence of "cause" under Wainwright. Trial counsel made it abundantly clear that the reason he was objecting to the "whole charge" was because the state had adopted "a new code in which many things are uncertain . . ." (H.T. 350; J.A. 48). As the court indicated in Holmes v. Israel, 453 F. Supp. 864 (E.D. Wisc. 1978), aff'd without published opinion, 618 F. 2d 111 (7th Cir. 1980):

---

[7]Under the en banc decision in Isaac v. Engle, 646 F. 2d 1129 (6th Cir. 1980) (A. 1-22), Mr. Hughes was entitled to judgment in his favor without respect to whether the objection of his counsel was or was not judged sufficient to preserve the error. Consequently, it was unnecessary for the Circuit Court below to resolve that issue and there is nothing in their one-page opinion to indicate that they did so. (A. 60.)

> This indicates that one of the Wainwright court fears, 'sand bagging' by the defense counsel, . . . does not apply in this case because the making of the general objection and the motion for mistrial indicate that defense counsel was not engaged in 'sand bagging.'" Id. at 867.

Both the statement of the reason for making the objection, as well as the objection itself, indicate that there was no deliberate attempt to build reversible error into the record in this case. Further, the fact that this error was not raised on appeal and that the habeas corpus action was filed pro se, belies any claim that counsel made a strategic decision to "reserve" the error in hopes of obtaining a new trial by raising the issue in future proceedings. Under these circumstances, the state lacks the interest necessary to legitimize the enforcement of its contemporaneous objection rule. Further, even if such a rule were to be applied, these same factors would constitute "cause" within the meaning of Wainwright v. Sykes, supra.

II.

The Effect of the Actual Futility of Making an Objection Upon the Adequacy of an Asserted Independent State Ground and on "Cause"

It has long been established that the law will "not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980). This is a familiar doctrine in determining whether a state procedural rule constitutes an adequate and independent state ground to preclude the vindication of federally protected rights. E.g., Douglas v. Alabama, 380 U.S. 415, 422 (1965). See also Estelle v. Williams, 425 U.S. 501, 512, n. 8 (1976) (noting that an objection would not have been "fruitless").

Within the context of habeas corpus litigation, it is well established that in spite of the requirement to exhaust state remedies, 28 U.S.C. Section 2254(b) and (c), exhaustion does not require a "futile" act or an "idle or useless effort." E.g., Tatzel v. Hanlon, 530 F. 2d 1205, 1206 (5th Cir. 1976); Lewis v. New

Mexico, 423 F. 2d 1048, 1049 (10th Cir. 1970). The exhaustion doctrine, like the procedural default principle of Sykes, supra, is based on comity. Fay v. Noia, 372 U.S. 311, 418-420 (1963). Just as comity does not require vain acts under Section 2254(b) and (c), neither does it require vain acts under Sykes. The state has no valid state interest in the enforcement of a procedure that would be futile. Further, futility itself constitutes "cause" under Wainwright.

In Isaac v. Engle, 646 F. 2d 1122 (6th Cir. 1980), the panel decision authored by Senior Judge Peck concluded that "[t]o require an objection in these circumstances would be to require the doing of a vain act." Isaac, supra at 1126 (A. 30). Since this conclusion was based upon a consideration of state law by the Circuit Court, it may be entitled to preferential consideration. E.g., Rummel v. Estelle, 445 U.S. 263, 267, n. 7 (1980); Jenkins v. Anderson, 447 U.S. 231, 234, n. 1 (1980). This

could be particularly true in this instance since Judge Peck may have special insight into both the status of the state law question and the futility of the objection given his prior experience as an Ohio Common Pleas Judge and a Justice of the Ohio Supreme Court. See THE AMERICAN BENCH 37 (1979) (biography).

As developed fully in Respondent Bell's Brief, the conclusion of the Isaac panel is fully supported not only by logic and reason, but also by this Court's decision in O'Connor v. Ohio, 385 U.S. 92 (1966). See also State v. Cowans, 10 Ohio St. 2d 97, 104, 227 N.E. 2d 201, 207 (1967). The very same point was made by the Ohio Court of Appeals in State of Ohio v. Newell Junior Hamilton, No. 5088 (2nd Dist. Ohio Ct. App., Mont. Cty., December 9, 1976) at 3:

> "Here, an objection to the instruction on self defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added.) (Copy reproduced in Respondents' Addendum.)

As strong as this conclusion is on general principles, there are specific facts which are even more compelling to Mr. Hughes' case. Under Ohio law a decision of a state Court of Appeals is binding upon all the trial courts within its district. E.g., In re Schott, 16 Ohio App. 2d 72, 75, 241 N.E. 2d 773, 776 (1968). Greenwood v. City of Portsmouth, 29 Ohio Misc. 161, 164-165, 281 N.E. 2d 45, 47 (Common Pleas, 1971).

Respondent Hughes was indicted and tried in Summit County, Ohio. Summit County is one of four counties in the Ninth Judicial District of the Ohio Court of Appeals. Mr. Hughes' trial commenced on January 21, 1975. (H.T. 6) Closing arguments were given on January 24 (H.T. 291) and the jury was instructed on that same day. (H.T. 330) Two days prior to the date on which the jury instructions were given, the Ninth District Court of Appeals issued its opinion in State of Ohio v. Robert L. Ladany, No. 7534 (9th

Dist. Ohio Ct. App., Summit Cty., January 22, 1975). After quoting and construing R.C. 2901.05, that Court held:

> ". . . we believe there is no change from the time honored rule that intoxication . . . when claimed by a defendant . . . must be established by a preponderance of the evidence." Ladany, supra at 9. (Copy reproduced in Respondents' Addendum at 66, 74.)

Based upon Ladany, the trial court--even had it interpreted R.C. 2901.05 in the same manner as it was subsequently viewed in State v. Robinson, 47 Ohio St. 2d 103, 251 N.E. 2d 58 (1976)--would still have been bound to instruct the jury that the accused bore the burden of proof on self-defense.

Indeed, the actual futility of raising the objection to the jury instructions here is forcefully demonstrated by that same Court's decision nine months later in State of Ohio v. Robert Earl Morrow, No. 7757 (9th Dist. Ohio Ct. App., Summit Cty., October 22, 1975). The third assignment alleged that error was committed:

"' * * * in instructing the jury that the defendant-appellant must prove his defense of self-defense by a preponderance of evidence.'" Id. at 3.

The Court's entire disposition of that error read as follows:

"From the time when the memory of man runneth not to the contrary, the rule in Ohio has been:

'On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence.'

Silvus v. State, 22 Ohio St. 90, Ezell v. State, 119 Ohio St. 39; Section 2901.05 R.C.

We reject assignment of error three." Id. at 4.

Consequently, Respondent Hughes maintains that any attempt to raise an objection on the jury instruction in question would have been futile in fact. The trial court not only would have disagreed with counsel but would have actually lacked the power to give a proper instruction because of the precedent binding

upon it. Under these circumstances, the state's interest in enforcing the contemporaneous objection rule is not sufficient to sustain it as an "adequate" state ground for barring review. Further, the actual futility would, itself, constitute "cause" under Wainwright.

III.

Prejudice and the Relationship between Self-defense and Manslaughter

The erroneous jury instruction in the case at bar shifted the burden of proof from the State and placed that burden upon the accused upon the issue of self-defense--the major factual question disputed before the jury. An error in the burden of proof in a criminal trial "substantially impairs" the "truth-finding function" and therefore "raises serious questions about the accuracy of the guilty verdicts in the past trials . . ." Hankerson v. North Carolina, 432 U.S. 233, 243 (1977) quoting and adding emphasis to Ivan V. v. City of New York, 407

U.S. 203, 204 (1972). See also Sandstrom v. Montana, 442 U.S. 510, 523-524 (1979). Consequently, such an error is per se prejudicial. Isaac v. Engle, supra at 1129 (panel decision, Judge Celebrezze, concurring); Isaac v. Engle, supra at 1134 (plurality en banc decision).

In the case of Respondent Hughes, the prejudice is particularly acute because of the fact that even with the erroneous jury instruction, the jury in his case nevertheless acquitted him of both aggravated murder and murder. It is true that the same jury also convicted him of voluntary manslaughter. But that fact, rather than mitigating the error, highlights the degree of prejudice. In Ohio, as in most states, there is great similarity between the facts that the jury must find to be true in order to reduce the crime of murder to

voluntary manslaughter and facts that would support a reasonable doubt as to whether or not the accused acted in lawful self-defense.[8]

Indeed, logical and common sense will bear out the fact that the "provocation" of

---

[8]With respect to voluntary manslaughter, Section 2903.03(a) of the Ohio Revised Code provides:

> "No person, while under extreme emotional stress brought by serious provocation reasonably sufficient to incite him into using deadly force, should knowingly cause the death of another."

While there is no statutory definition of self-defense in the State of Ohio, the Ohio Supreme Court has indicated that there are three "elements" to self-defense:

> a. "The slayer was not at fault in creating the situation giving rise to the affray . . . ;
>
> b. "The slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; . . . and
>
> c. "The slayer must not have violated any duty to retreat or avoid the danger . . . " (Citations omitted.)

State v. Melchior, 56 Ohio St. 2d 15, 20-21, 381 N.E. 2d 195, 199 (1978).

manslaughter and the "justification" of self-defense are different ends of the same continuum. In a given fact situation, it is entirely conceivable that while a defendant may have actually been in serious fear of great bodily harm or death, the jury may nevertheless determine that such fear was not reasonable and hence find that he is not justified in acting in self-defense. The same jury may nevertheless find that the actions of the deceased constituted sufficient "provocation" to justify returning a verdict of guilty of voluntary manslaughter. Alternatively, one can imagine situations where the jury, if it credited the entire testimony of the accused, would return a verdict of not guilty based upon self-defense. Yet, a jury might reasonably credit some but not other portions of a defendant's testimony and therefore return a guilty verdict of voluntary manslaughter. It is because of circumstances such as these that the provocation necessary for voluntary manslaughter has often been referred

to as "imperfect" self-defense. See generally LaFave and Scott, Section 77, pp. 583-584 (1972) and I Warren on Homicide Section 151 (1914). This point is borne out by the case of State v. Vancak, 90 Ohio St. 211, 107 N.E. 511 (1914). There, the Ohio Supreme Court discussed the relationship between manslaughter and self-defense:

> "If the blow was struck in self-defense, then the act was lawful, and the accused innocent of any crime. If the blow was not struck in self-defense, then the act was unlawful, and, death having ensued, the accused was guilty of manslaughter, unless the elements of murder in the first degree or murder in the second degree were present . . . ." 90 Ohio St. 214-215, 107 N.E. at 512.

Further, the Court indicates that since the jury found the defendant not guilty of murder in the first degree or in the second degree:

> ". . . it follows that if he fails to sustain his plea of self-defense by a preponderance of the evidence, he was guilty of manslaughter . . . ." Id.

Consequently, Respondent Hughes maintains that as great as the prejudice was in the cases of Respondents Bell and Isaac, it was even more evident in his own case. It was entirely possible that the jury found there was at least a reasonable doubt as to whether he was acting in self-defense, but failed to acquit him solely because of the view that he failed to prove self-defense by a preponderance of the evidence. This being the case, the same evidence which raised a reasonable doubt upon guilt or innocence on the self-defense issue could well have been used by the jury to reduce the alleged crime from murder to voluntary manslaughter.

CONCLUSION

The general principles which call for the affirmance of the decision of the Circuit Court below in Respondent Bell's and Respondent Isaac's cases also support a judgment in favor of Mr. Hughes. While the close relationship between self-defense and the provocation aspect of manslaughter injects a heightened visability to the prejudice in Mr. Hughes' case, it cannot be doubted that jury instructions shifting the burden of proof prejudiced each of the Respondents. Moreover, the particular facts of Mr. Hughes' case--the objection made by his counsel at trial and the demonstration of the actual futility in the making of such an objection--illustrate both the inadequacy of the state's interest in the enforcement of Ohio Criminal Rule 30 and the existence of "cause"

for all three Respondents. Accordingly, Respondent Hughes submits that the judgment of the Sixth Circuit United States Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

J. DEAN CARRO

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent
Hughes

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief were sent by first-class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and Richard David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, 43215, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113," on this ___ day of August, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
Counsel for Respondent

CASE NO. 80-1430

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TED ENGLE, Superintendent,
Chilicothe Correctional Institute,
Petitioner,

v.

LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,

v.

KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent
Chilicothe Correctional Institute,
Petitioner,

v.

HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioners

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OPINIONS BELOW

The panel decision of the United States Court Of Appeals For The Sixth Circuit in **Isaac v. Engle** is now reported at 646 F. 2d 1122 (6th Cir. 1980). The en banc decision in **Issac** is now reported at 646 F. 2d 1129 (6th Cir. 1980).

STATEMENT OF THE CASE

For present purposes the only additional statement of the case necessary is a clarification of the facts concerning the actual crimes presented in Hughes and Isaac's answer briefs on the merits. Unlike other courts which have dealt with similar burden shifting issues the appellate court below "presumed" prejudice and made no reference to the actual facts of the crime beyond the fact that self defense was in issue. See: **Myers v. State of Washington**, 646 F. 2d 355 (9th Cir. 1981). Having attempted to bolster this ruling of law which is challenged in these cases, it is at least incumbent that a balanced and accurate presentation be made.

An example is Hughes' assertion that the only other adults present testified as defense witnesses consistent with Hughes' testimony that he had acted in self defense. Hughes' brief, page 7. Minnie Jackson, one of the two adults referred to testified that prior to the shooting the victim was standing over by a coffee table talking to Marie Hubbard preparing to leave, that his hands were down at his sides, and that he was not moving toward Hughes. (Hughes Tr. 216-219). In addition, she testified that she did not see the second shot as she was running to the basement and kept on going. (Hughes Tr. 211). Roger Logan's (Bootsie) testimony was even more inconsistent with Hughes. Logan testified as follows:

Q. Okay. There came a point, I believe, when Lemuel Johnson stood up from this davenport (indicating) is that correct?

A. Yes. He got up and went to the door.

Q. All right. Then what's the next thing you saw and observed?

A. Well, after he stood there and listened to Marie and Howard bickering among themselves, he stood up and said, "Well, I ain't got but one thing to say," and started walking towards Howard.

Q. Then what happened?

A. Well, he extended one of his hands toward Howard, and Howard told him that he didn't – he wasn't going to shake like that, and backed away from him.

Q. Okay. Then what Happened?

A. Then when he took a couple more steps Howard pulled the gun and shot him.

Q. Did you hear Howard give any warnings to back off, keep away?

A. No. Howard didn't say anything to him.

Q. All right.

A. He just said he didn't shake that way.

Q. How many shots were there?

A. I heard two.

Q. And when the second shot was fired was Lemuel backing up or going forward towards Howard?

A. Well, when the first shot hit him I think he was fixing to fall.

Q. All right. And did he continue forward or did he back up?

A. He was falling away.

Q. All right. Now, would you describe for this Court and Jury how the shots were fired? In other words, was it a bang - - bang, or was it a bang - bang?

A. Well, the first shot was fired off and a second or two and the other one was fired.

(Hughes Tr. 230-232). In addition, Logan testified that he never saw the victim's hands in his pockets and that when he extended his hand it was open. (Hughes Tr. 233-238, 240). In fact, Logan so contradicted Hughes' version of events that defense counsel requested he be declared a hostile witness:

> Your honor, I'm declaring this man a hostile witness. He's testifying for the State.

(Hughes Tr. 235).

Hughes points out that petitioners have never contested that self defense was properly in issue. Having shot the victim in front of witnesses, that was the only defense Hughes had. But no witness backed up Hughes' version of the events and as demonstrated above his "Defense" witnesses were equally as helpful, if not more so, to the State. Upon consideration of the entire record and not just Hughes' testimony the state appellate court stated:

> Our examination of the testimony of the witnesses in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand.

(JA 53).

Isaac's version of the facts in his case is even more misleading. The statement is made in Isaac's brief, page 1, that:

> "Isaac claimed Engle, without provocation, sucker punched him first from behind and he acted in self defense. . . . The only witnesses to the first punch were Isaac and Engle. Mrs. Schob admitted upon cross examination, that she did not see the beginning of the fight."

The entire statement is erroneous. Engle claimed that Isaac sucker punched him from behind not the reverse. Isaac's testimony at trial was that he decided to go see him ex-wife at the bar where she worked, that "she cussed me out" and told him to leave. At that time Engle drove up, called him over, told him to leave his ex-wife alone, and took a swing at him which grazed

his right shoulder. At that time, Isaac hit him "three or four hard licks" with his bare fists knocking him to the ground. When he got back up, Isaac hit him "another two or three licks" and knocked him down again, at which time he didn't get up again. Isaac then left the scene. (Isaac Tr. 128-131). In an earlier statement to police, Isaac stated a similar version except that the first punch missed and did not graze him.

A similar misstatement is made with respect to the testimony of Isaac's ex-wife, Donna Schob. Schob testified as follows:

> A. . . .Mr. Engle pulled up right in front of his car and he got out. Mr. Engle got out and Mr. Isaac was already standing beside his car and so the next thing, I saw Mr. Isaac throw a punch at him. I knew something - he was trying to do something. I immediately came back in and called the police.
>
> Q. You saw Mr. Isaac throw a punch at Mr. Engle?
>
> A. At Mr. Engle.
>
> Q. And you saw Mr. Engle from the time he pulled up until the time he was struck?
>
> A. I saw him get out of his car. He pulled up in front of Mr. Isaac's car and got out of his car. In other words, you might say they were standing face to face.
>
> Q. . . . .

A. . . . .

Q. Were you able to observe them during this time?

A. Just as I said, I saw him throw the first punch, then I immediately ran back in and called the police.

Q. Did you at any time see Mr. Engle say or do anything prior to the time Mr. Isaac hit Mr. Engle?

A. No.

Q. Did he raise either of his hands or fists?

A. I did not see that.

(Isaac Tr. 21-22). Upon cross examination, defense counsel asked her a series of questions, some inaccurately premised as to time and place as to what she had seen from the window on the side of the building as opposed to the window in the door of the bar. Such questions resulted in the statement relied upon by Isaac that she admitted she did not see the first blow. Redirect examination however disclosed that such statement was not the testimony of Schob. (Isaac Tr. 51). Schob repeatedly testified on redirect and recross that she saw the incident entirely from the time Engle got out of his car until the first blow was struck. (Isaac Tr. 52-61, 65-66).

The record, of course, contains many conflicting versions of what occurred including whether Engle warned Isaac not to see his ex-wife or Isaac warned his ex-wife not to see Engle. Even taking Isaac's version at face value however the jury could rightfully have rejected self defense. According to Isaac's own testimony, he

knocked Engle to the ground twice by as many as seven "hard licks" in response to a grazing swing at his shoulder. The ultimate impact of whether this was self defense was evident to the jury from the nature of Engle's injuries - including a broken jaw, facial lacerations, and a mechanical brace to hold his face together.

REPLY ARGUMENT ON THE MERITS

A. FUTILITY OF OBJECTION

Petitioners have asserted that the Court of Appeals' analysis in these cases makes **Wainwright v. Sykes**, 433 U.S. 72 (1977), a nullity by removing any middle ground between ineffectiveness of counsel and cause in which counsel's actions will be binding upon his client. The answer briefs of respondents demonstrate that petitioners' perception is accurate.

The clearest statement of the dispute between the parties is evidenced by Isaac's brief at page 6:

> The duty of trial counsel is not to make new law, but to diligently find existing law and provide it to the court so it has the opportunity to correctly charge the jury as to the law to be applied in the case.

The response of Judge Poole, dissenting in **Meyers v. State of Washington**, *supra* at 363, 364 is answer enough:

> . . .it should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new", but logical

> and reasonable extensions of previously established, or at least suggested, doctrines. This is important to the values we place on competence in advocacy in the larger aim for fair trial. The majority, it seems to me, ignores or denigrates these fundamental aspects of our legal system by the suggestion that it is unreasonable to expect the defense to raise objections at trial that are thoughtful and creative, rather than mere rote recitations of horn-book legal principles. The majority also takes too limited a view of the comity interests involved in this situation. Unless the objection was truly so far ahead of its time that its conception would have been visionary, I think that the state trial court is entitled to an opportunity to consider it before it may provide the basis for reversal on habeas corpus. Foresight of this level does not, as the majority seems to fear, accrue only to legal prophesy; it hallmarks also the able defender.

While Isaac cites **State v. Williams**, 51 Ohio St. 2d 112 (1977) for the proposition that Ohio Cr. R. 30 presupposes the existence of an established ground for objection the holding of the case and the reference therein to the "true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error" establishes that Ohio Cr. R. 30 does not have the limited purpose ascribed to it by respondents.

Respondents have attempted to isolate two separate and independent components of futility - the lack of perception of the issue itself and secondly, if perceived, the lack of probable success of such issue if raised. What

respondents have not shown however is how such indicia are any different than any other indicia which determine whether to raise an issue. The failure to determine whether an issue exists or that if it exists, it will be successful are no less strategic than any other decision counsel is entrusted to make.

The present cases serve as prime examples. Isaac asserts that his counsel after diligently researching the issue concluded that no change in the law had occurred. That however underscores that the determination was strategic. While offering an explanation that such decision was reasonable in light of prior law, it does nothing to further the analysis that such explanation is justification as well.

The question of burden shifting is not new - the concept is of long standing origin. At the time of respondents' trials, the doctrine had been applied in many other state courts systems and in the federal system itself to self defense claims and other affirmative defenses. Moreover, a new statute was in effect, and this court's recent decision in **Mullaney v. Wilbur**, 421 U.S. 684 (1974) had been decided. To say that the issue was "visionary" as opposed to difficult is simply incorrect. Respondents have asserted on the merits that the **State v. Robinson**, 47 Ohio St. 2d 103 (1976) error was so fundamental as to deny them a fair trial. But if it is now perceived that the error was so fundamental, it could have been perceived prior to trial. As this Court noted in **Wainwright**, if a defendant believes that an action of a trial court is about to deprive him of a constitutional right, it is incumbent on that defendant to raise it.

Similarly, the argument that if the issue had been raised at trial or on appeal, it would not have been successful is strategic explanation, not justification. Bell and Hughes demonstrate this point well. Bell asserts at page 53 of his brief in support of an argument for

objective practical futility that four Ohio Appellate Courts had decided the issue adversely to the later decision in **Robinson,** *supra* and at page 52 that there are seven documented cases in which an objection was overruled. Hughes goes even further and at pages 18-20 of his brief argues "actual" futility by intermediate appellate decisions controlling his case. Aside from showing however that the issue was being raised by other counsel (despite earlier assertions that it was impossible to conceive the issue) it underscores the fact that ultimate success is not always achieved at the trial court level or even initial appeals. Whether the issue is deemed important enough to pursue to completion in the face of adverse authority is part of the strategic calculus.

An example is **Hawk v. Berkemer,** 610 F.2d 445 (6th Cir. 1979). There the State of Ohio successfully challenged two prior adverse Sixth Circuit precedents on exactly the same point. Had that Court not been persuaded to change its earlier views, certiorari would certainly have been available to further contest the issue. The Court may of course, take judicial notice of decisions in which the Court ultimately reversed a prior precedent. Moreover, assuming that Hughes and Bell had researched the issue and were actually aware of the unreported decisions that they now rely on as having deterred raising the issue, it is then possible that they might also have become aware of the appellate court opinion in **State v. Robinson,** 48 Ohio App. 2d 197 (CA Franklin 1975) and the earlier December 24, 1974 opinion in **State v. Mathews,** No. 74 AP 428. See 48 Ohio App. 2d *supra* at 200. At that time, Bell and Hughes could have requested certification of the issue to the Ohio Supreme Court based upon conflict in appellate decisions.

It is of course impossible to know at this time whether Bell and Hughes were actually aware of these unreported decisions at the time of their trial and were thus "deterred". Neither made an objection at trial and

neither raised the issue on appeal. While acknowledging that the objection he made seemed to go to different issues Hughes does argue his counsel made an objection to the "entire charge". Whether Ohio would have recognized such a non-specific objection however is impossible to say as the "issue" was not pursued on appeal. **United States v. LeBlanc**, 612 F. 2d 1012 (6th Cir. 1980). Moreover, even if the objection were not specific enough, Hughes then argues that the failure to make a specific objection shows a lack of deliberate "sandbagging". But the term, as used in **Wainwright,** *supra* does not necessarily imply gamemanship. **Washington v. Estelle**, 648 F. 2d 276 (5th Cir. 1981). Hughes certainly wishes now to take advantage of an issue he neither raised nor helped decide.

A central theme to the argument on futility is that the State has no legitimate interest in preventing resolution of these cases if the objection was not easily made. But finality in the law is an interest which is both viable and necessary. **Federated Dept. Stores, Inc. v. Moitie,** _____U.S._____101 S. Ct. 2424 (1981). If the objection had been made, the trial court may have perceived the issue. If the issue had been raised on appeal, the appellate court like **Robinson** might have reversed. If the issue had been prosecuted to the Ohio Supreme Court, the pertinent case may have been, not **Robinson**, but Bell, Hughes, or Isaac. While Bell appears to argue that instructions are somehow different than other issues at trial, they, no less than other issues, serve to focus the efforts of the parties upon the main event in the criminal law process - the trial.

That no middle ground exists under respondents' theory is seen from the alternative argument that their failure to raise the issue is ineffectiveness of counsel. Respondents assert that if their counsel had a duty to anticipate the issue, then the failure to so anticipate is ineffectiveness, per se. Such a view requires the criminal justice system to insure that all counsel are equal. A

defendant is entitled to competent counsel - not perfect counsel. The issue before the court is whether competent counsel can bind their client to less than perfection.

B. RETROACTIVITY AND EQUAL PROTECTION

The amicus brief of the Institutional Legal Services Project (State of Washington) seeks to assert that the State's interest in finality is subsumed in the determination of retroactivity. Even accepting that formulation of the problem however, no additional benefit is conferred on respondents. Ohio, in determining the retroactivity of its state created decision, balanced the interests such that the decision in **Robinson** was retroactive to those who objected. Unless equal protection is implicated, the amicus argument fails in its initial premise. In terms of equal protection, what Ohio did was clearly premised on the guidance by this Court in **Hankerson v. North Carolina**, 432 U.S. 233 (1977).

A separate equal protection argument is raised by Isaac. Isaac asserts that Ohio Cr. R. 30 denies equal protection in that it applies only to jury trials. **State v. Humphries**, 51 Ohio St. 2d 95 (1977). The issue was never raised in any court below. Moreover, there is nothing irrational about drawing a distinction between a self instructed trier of fact who is presumed to know the law and a jury which must be instructed as to controlling principles.

A final equal protection argument is raised by Bell. At pages 46-49, Bell argues based on unreported state cases decided prior to **State v. Long**, 53 Ohio St. 2d 91 (1978) that the determination of whether **Robinson** is plain error has been decided by the Ohio Courts in an arbitrary and capricious manner. Equal protection how-

ever does not guarantee uniformity of judicial decisions. **Beck v. Washington,** 368 U.S. 651 (1962). This is especially true in the absence of an authoritative construction by the State's highest court. Moreover, it should be noted that **State v. Long,** *supra* did not foreclose that plain error might be shown. Rather, it simply held that plain error is not established simply by citation to **Robinson.**

C. PLAIN ERROR – ADEQUATE STATE GROUNDS

A third argument common to respondents is that **Wainwright** should not apply to "plain error". Although not relied on by the Appellate Court below, this was the initial response of such court to waiver questions. **Berrier v. Egeler,** 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955. The argument proposes that because a state has a plain error review mechanism of its own that it has waived any legitimate interest that it has to enforcement of its contemporaneous objection rule. Such an approach creates the novel proposition that in order to invoke the interests of its contemporareous objection rule, the State would have to eliminate its plain error review muchanism. This is hardly likely to make the state courts more receptive to being a co-equal court with the federal courts in responding to claims of constitutional deprivation. Having recognized the validity of contemporaneous objection rules in **Wainwright,** it would appear anomalous that such rules are so fragile. In **Hockenbury v. Sowders,** 620 F. 2d 111, 114 (6th Cir. 1980), Judge Kennedy, writing for the Court stated:

> **Wainwright** makes it clear that the role of the federal courts in preventing manifest injustice in these cases is maintained through the application of the "cause"

> and "prejudice" exception to the finality of state procedural rules, rather than an independent application of those rules.

See also: **Wainwright,** *supra,* at 90-91.[1] The notion of "independent" plain error gives no deference to comity or the state's interest in finality. *See;* **Ratcliff v. Estelle,** 597 F. 2d 474 (4th Cir. 1979).

To be sure, the Court might find an asserted independent state ground to be inadequate. **Henry v. Mississippi,** 379 U.S. 443 (1965). But if an independent state ground is found to be adequate, it should not be subject to a non-definable plain error rule above and beyond "cause and prejudice". Moreover, the contemporaneous objection rule involved herein meets the traditional tests of an adequate state ground. **Wainwright,** *supra.* While amicus, the Ohio Criminal Defense Lawyers Association asserts use of the contemporaneous objection rule is a device to avoid consideration of a federal right, that merely states the obvious with respect to all preclusive procedural devices. Balancing the interests of the State in the finality of their criminal convictions - in these cases - mostly homicides, Ohio has not created an impermissible artifice to defendants seeking the benefits of the state created **Robinson** decision.

D. WAIVER OF WAIVER

Bell asserts two arguments, not raised previously in opposition to certiorari being granted, that petitioners have waived the waiver argument in his case. Aside from the fact that neither argument is applicable to Isaac,

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1. Despite the above resolution, it appears that at least some members of the appellate court below still adhere to a contrary view. *See:* **Hockenbury v. Sowders,** 633 F. 2d 443 (6th Cir. 1980); **Murray v. Superintendent,** 651 F. 2d 541 (6th Cir. 1981).

Hughes or the numerous other decisions pending in the federal courts in Ohio awaiting resolution of these cases, neither argument has merit.

The first argument is that petitioners did not raise the waiver issue with respect to Bell's case in the district court. Whatever the merit to this contention, it is clear that it was not the basis for decision by the appellate court in **Bell v. Perini**, 635 F. 2d 575 (6th Cir. 1980). Instead, that Court ruled:

> We believe that Bell, in the instant case, has likewise shown "cause" and "prejudice" as is required by **Wainwright** for the reasons stated in the plurality opinion in **Isaac.**

Supra at 578. Moreover Judge Merritt specifically dissented on the basis that Ohio's contemporaneous objection rule provided an independent state ground. Having actually ruled on the waiver question, the decision of the Court of Appeals is ripe for review. **City of Newport v. Fact Concerts, Inc.**, _____U.S._____, 101 S. Ct. 2748 (1981).

The second objection, never raised in any court below is that the failure of the State to submit the transcript of Bell's trial to the district court eliminates any factual predicate from the record that Bell did not object. What respondent does not assert however is that Bell did in fact object. If Bell is now contesting his prior acquiescence in the statement that Bell did not object, it is an assertion which can be readily verified.

E. STATE LAW ERROR – CONSTITUTIONAL ERROR

The clearest dispute between the parties on the merits is evidenced by Bell's brief. At page 4, Bell states:

> . . .United States Court of Appeals for the Sixth Circuit determined that it was error to place the burden of proof upon the accused to prove that they had acted in self defense. Petitioners do not deny that such an error occurred.

Petitioners do not deny that an error occurred pursuant to the state created decision in **State v. Robinson,** *supra.* Petitioners do deny and vehemently contest that an error of consitutional law occurred. This case is simply not **Mullaney v. Wilbur,** *supra.* In **Mullaney,** the state law as applied was found to unconstitutionally shift the burden of proof. In these cases, the State Courts, by misapplying state law which had yet to be construed, gave the lesser of two equally constitutional instructions. It is in apparent recognition of this destinction that Bell attempts to persuade the Court that the instruction actually given is itself unconstitutional.

Bell's argument on this point has two major components. The first is that it is inherently and fundamentally unfair to place the burden of proof of the confession and avoidance doctrine of self defense on the defendant. To this extent, Bell's argument implicates the inherent power of a State to define the essential elements of the crime. **Patterson v. New York,** 432 U.S. 197 (1977). However, the Sixth Circuit's precedents are of no aid to Bell on this point. In **Carter v. Jago,** 637 F. 2d 449 (6th Cir. 1980), (petition for rehearing en banc pending) the Court rejected the contention that is beyond the power of a legislature to determine that the person in the best position to know the facts of the

defense could be required to carry a "preponderance" burden as to it. See also: **McElroy v. Holloway,** _____ U.S._____, 69 L. Ed. 2d 398 (1981), Rehnquist, J. and Burger, C.J., dissenting. It may be that the doctrine of self defense springs from constitutional bases itself. But making the determination that a state must provide a defense of self defense says nothing as to how it must be defined or who has the burden with respect to it.

The second argument is that self defense negates other unspoken elements of crimes in Ohio, thus requiring the State to disprove the existence of the defense. In reality, however, this argument posits that there never have been, are not, and could not be any affirmative defenses in Ohio. This is particularly novel in light of the holding in **Robinson** itself that self defense was not in issue unless the defendant raised it.

The central premise of this argument is that since self defense results in a finding of "not guilty" it must contradict an element. As suggested "elements", Bell proposes the "requirement of criminal conduct", the "requirement of criminal intent", the "requirement of a voluntary act", the "allegation of unlawfulness" and the "allegation of against the peace and dignity of the State". The failure of Bell to even cite to **State v. Poole,** 33 Ohio St. 2d 18 (1973) establishes that the argument is not founded on the authoritative construction of Ohio law on affirmative defenses. Therein, the Ohio Supreme Court stated at page 19:

> This Court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, *provable for the most part under the plea of not guilty,* which are referred to as "affirmative defenses".

(emphasis added). Under **Poole**, Ohio could require a jury to state its verdict as not guilty or "not punishable by reason of self defense". That Ohio has chosen a different form does not control the substance of what occurs.

A comparison of Bell's argument to the historically recognized affirmative defense of insanity establishes that Bell is arguing for elimination of all affirmative defenses. While insanity is called a defense of excuse and self defense, a defense of justification, each is premised on the notion that a person who has done an act with the requisite intent required by law should not be punished. Under Bell's theory, insanity would also violate "criminal conduct", "criminal intent", "voluntary act", "unlawfulness", and "peace and dignity". A more accurate statement of Ohio law is that otherwise criminal conduct is not punished.

Bell's third argument is that relied on by the appellate court below - once Ohio enacted O.R.C. section 2901.05 it created "absence of self defense" as a functional element of the crime rather than merely altering the quantum of proof required for an affirmative defense. While Bell appears to rely on unreported state appellate decisions, petitioners would prefer the authoritative constructions of Ohio law of the Ohio Supreme Court. Bell dismisses the impact of **State v. Abner**, 55 Ohio St. 2d 251 (1978) and the refusal of the Court therein to require a specific instruction on the duty of the State to disprove self defense by making the bald statement that since absence of self defense is an element under **Robinson**, that **Abner**, is probably unconstitutional as well. Bell, brief page 18. Moreover if there was ever any doubt that self defense remained an affirmative defense after **Robinson, State v. Jones**, 67 Ohio St. 2d 244, 249 n. 1 (1981) settles that question:

> This Court has held that the defenses of insanity, intoxication, and self defense are affirmative defenses. **State v. Robinson,** (1976), 47 Ohio St. 2d 103, 108.

Petitioners' principal problem with the analysis utilized by the appellate court is that it draws no distinction between what errors of state law are matters of state concern and what are federal constitutional questions. The premise appears to be that **Robinson** created a protected interest which it is somehow the federal courts duty to enforce. But if **Robinson** was itself not constitutionally required, how does the appellate court distinquish between the interest created by any other state statute, evidentiary principle, or rule of procedure. Under the appellate court analysis every question of error of state law becomes a federal habeas corpus concern. While not previously articulated in this fashion, this Court has consistently held that the process which is due for errors of state law is appellate review in the state courts. **Wainwright v. Stone,** 414 U.S. 21 (1973). Unless federal habeas corpus courts are to be super appellate courts for the states, such distinction must be renewed.

CONCLUSION

The decisions of the Courts below are erroneous as to both the "cause" and "prejudice" components of **Wainwright v. Sykes,** *supra.* As such, a reversal in each case is required.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record for Petitioners

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Petitioners has been served on respondents by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main St., Circleville, Ohio 43113, counsel for Isaac; and Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell and Hughes, by U.S. Mail, postage paid, this _____ day of September, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 44113; Kenneth Bell, No. 141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
Counsel of Record

that self-defense negates such an allegation. *State v. Tuncle*, No. 38424 (8th Dist. Ohio Ct. of App., March 8, 1979) at 6-7 (Addendum 128-129);[17] and *State v. Simon*, No. 6262 (2nd Dist. Ohio Ct. of App., January 16, 1980) at 12-13 (Addendum at 118-119).[18]

It should therefore be clear that unlawfulness is an element of the crime which the state must prove beyond a

[17]There is some confusion as to the precedential stature of *Tuncle* engendered by the opinion of the Sixth Circuit in *Carter v. Jago*, 637 F. 2d 449, 456, n. 6 (6th Cir. 1980). An examination of *Carter* will reveal that the Court made three separate errors in its treatment of *Tuncle*.

First. The Court suggests that the *Tuncle* opinion was *dicta*. However, an examination of *Tuncle* (p. 4), indicats that the Court was treating the argument of the prosecutor that he "does not have to prove a lack of self-defense beyond a reasonable doubt."

Second. The Circuit Court indicates that *Tuncle* was "superseded" by *State v. Newell*, No. 40470 (8th Dist. Ohio Ct. App., March 13, 1980). But, even though the Eighth District Court of Appeals is a multi-judge, multi-panel (9 judges, 3 panels) District, there is no mechanism, short of a decision by the Supreme Court, by which decisions can be "superseded." One panel does not have the authority to overrule the decision of another.

Third. *Newell* was a case involving duress — not self-defense — and hence has no applicability to self-defense. The *Newell* panel seems to have recognize this fact since it neither cited nor discussed *Tuncle*.

[18]The *Simon* opinion reversed on two grounds, one for violation of the *ex post facto* clause and the second for constitutional reasons on the shifting of the burden of proof. Though conceding the propriety of the ruling on the first ground, the State moved for reconsideration on the secod ground. In response to that request, the Court issued a "Supplemental Opinion" on January 22, 1980 indicating that since it reversed on the first question, "the constitutionality of [Section 2901.05(A)] . . .is not at issue in this appeal and is in no posture for decision." (Addendum at 121). Cf. Ohio Appellate Rule 12.

Nevetheless, it is clear that the Court did not "withdraw" its prior opinion, nor forbid reference toit. Certainly the construction placed upon the statute by three respected judges is worthy of consideration in the absence of other controlling authority.

reasonable doubt. Yet, it is equally true that proof of self-defense necessarily negates this element of the crime. Ohio cases have uniformly recognized that proof of self-defense would negate the element of unlawfulness and utilize what is now an unconstitutional presumption to place the burden of proof on self-defense on the defendant. *E.g., Silvus v. State* 20 Ohio St. 90 (1871).[19] *See also, McElroy v. Holloway,* 632 F. 2d 605 (5th Cir. 1980), *cert. den.* 49 U.S.L.W. 3881 (1981); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom Hankerson v. North Carolina,* 432 U.S. 233 (1977); *Commonwealth v. Hilbert,* 382 A. 2d 724, 731 (Pa. 1978). Thus Constitutional error occurred when the court required these defendants to prove their innocence by disproving the unlawfulness element of the crime.

E. The State Cannot Constitutionally Make Actions Taken in Self-Defense a Crime

Because self-defense is inconsistent with criminal activity, the State can justify placing the burden of proof upon the accused *only* if it criminalizes actions taken in self-defense. Though the Ohio Attorney General has argued that the State has

[19]Petitioners have suggested that because self-defense has been denominated an "affirmative defense" its existence is "wholly collateral" to the elements of the crime. (Pets.' Brief at 18.) However, an examination of *State v. Silvus, supra* at 99 and 101 makes it clear tha proof of a killing raised a presumption of unlawfulness which self-defense rebutted. This presumption theory has been utilized in more modern cases, *e.g., State v. Robinson,* 161 Ohio St. 213, 118 N.E. 2d 517 (1954); *State v. Kinnemore,* 34 Ohio App. 2d 39, 295 N.E. 2d 680 (1972). In *State v. Humphries,* 51 Ohio St. 2d at 98, 364 N.E. 2d at 1357, *Silvus* is cited as authority for what the common law (pre-1974) rule was in Ohio with respect to the burden of proof on self-defense.

done this,[20] one should not lightly make this inference since the right to act in self-defense is protected by two separate provisions of the State Constitution.[21]

Moreover, any attempt by the State to criminalize self-defense would violate several provisions of the Federal Constitution. First, a command by the State that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd. For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[22] Second,

[20]In the District Court in Respondet Hughes' case, counsel for Mr. Engle argued:

> "The legislature has defined what act and what intent are required in order for a finding of *crime*. Since self-defense is a confession and an avoidance, the most that can be said is that the legislature did not intent to punish that which would otherwise be a crime." (Emphasis added.) "Respondents' Reply to Petitioner Hughes' Memorandum on the Merits" at 2. (Docketed: 6/25/79.)

[21]Article I, Section 1 of teh Ohio Constitution provides in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and *defending life . . .and* obtaining . . .*safety*. (Emphasis added.)

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense [sic] and *security . . .*" (Emphasis added.)

This latter provision is "intended to . . .afford the citizen [a] means for his defense of self and property." *State v. Hogan*, 63 Ohio St. 202, 219, 58 N.E. 572 (1900).

[22]IIIn *State v. Hardy*, 60 Ohio App. 2d 325, 329, 397 N.E. 2d 773, 776 (1978) the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his lifel . . .without due process of law. Obviously the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

to punish one whose only "crime" was to save his own life when attacked by a wrongdoer would be violative of the cruel and unusual punishment provision of the Eighth Amendment.[23]

Equally as important, the attempt to deprive the people of the "right" of self-defense by making such conduct criminal would deny them constitutional rights reserved and protected under both substantive due process under the Fourteenth Amendment and the Ninth Amendment. With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *quoted with approval*, *Patterson*, *supra* at 201-202. It should not be open to question that self-defense is such a right.

Historically, a homicide which resulted from an act taken in legitimate self-defense was justifiable and not unlawful. *Mullaney supra* at 692.

This right was also recognized in early Federal case law:

> "Where crime is committed with impunity . . .those unprotected by other sanctions . . .[are] compelled . . .to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security."

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[23]The Eight Amendment prohibits cruel and unusual punishment—including punishment that is disproportionate to the "offense." *Coker v. Georgia*, 433 U.S. 584 (1977). Punishment for *any* lawful act, including self-defense is both disproportionate and cruel and unusual. *See also Holloway v. McElroy*, 632 F. 2d 605, 627, and n. 35, and 636, n. 49, noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

United States v. Rhodes, 27 Fed. Cas. 785 (Cir. Ct. Ky.) (1866).[24]

See, e.g., Wallace v. United States, 162 U.S. 466 (1896).

As acknowledged by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense,therefore, as it is justly called *the primary law of nature*, so it is not, *neither can it be in fact, taken away by the law of society.*" *Reed v. State*, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Under the Ninth Amendment:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

To deny a citizen the right of self-defense would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," *Boyd v. United States*, 116 U.S. 616, 630 (1886). Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." *Stoffer v. State*, 14 Ohio St. 47, 53 (1864).

Accordingly, the State cannot justify placing the burden of proof on self-defense upon the accused under the theory that it has criminalized such conduct.

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[24]Compare Justice Rehnquist's opinion in *Coleman v. Balkcom*, ___ U.S. ___, 49 U.S.L.W. 3803, 3806 (June 15, 1981) (dissenting from denial of certiorari):

> "In Atlanta, we cannot protect our small children at play. In the Nation's Capitol, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment." (Footnote omitted.)

IV.

WHEN THE BURDEN OF PROOF IS SHIFTED SO AS TO IMPAIR THE ACCURACY OF THE JURY'S VERDICT, THE FEDERAL COURTS ARE NOT POWERLESS TO CORRECT THE ERROR.

Petitioners assume, without discussion, that the *Sykes* procedural default rule is applicable to the cases at bar and proceed to argue that neither "cause" nor "prejudice" has been shown. However, a careful examination will reveal that: (A) the principles of *Sykes* are not applicable to cases such as the ones presently before the Court; (B) under the facts of these cases, any attempt to apply a contemporaneous objection rule would violate procedural due process, substantive due process, and equal protection as guaranteed under the Fourteenth Amendment; and (C) even if *Sykes* were applicable, both cause and prejudice have been demonstrated. For purposes of clarity, each of the points will be analyzed separately.

A. Sykes Is Not Applicable To the Cases Presently Before This Court

1. Jury instructions which erroneously place the burden of proof upon the accused constitute "plain constitutional error."

The contrast between the fundamental nature of the error in the case at bar and those cases in which this Court has held that a procedural default resulted in a forfeiture of a right to have a claim adjudicated on the merits is significant. Both *Davis v. United States*, 411 U.S. 233 (1973) and *Francis v. Henderson*, 425 U.S. 536 (1976) involved challenges to the compositions of the grand juries. As important as it is that

grand jurors be properly selected, the claim did "not in any way affect the determination of guilt or innocence, but allege(d) only a curable defect in the initiation of the proceeding." (Brief of the U.S. in *Davis* at 16.) In arguing for application of the rule in *Davis*, the United States specifically indicated that it did not argue that a rule could be adopted "barring collateral relief on all claims not timely asserted without regard to the effect of the alleged constitutional violation on a defendant's right to a fair trial. ." (Brief of the U.S. at 14). The United States stressed that the rule did not apply "to objections or defenses which go to the fairness of the guilt determining process . . ." (Brief of the U.S. at 15).

In *Estelle v. Williams*, 425 U.S. 501 (1979), this Court held that there was no violation of any constitutional right since there was no "compulsion" that the accused appear at trial in prison clothes. It was also noted that the appearance before a jury in prison clothes did not involve a "fundamental right", *Estelle, supra* at 508, n. 3, nor implicate the truth-finding function of the jury.

The situation was no different in *Sykes*. That case involved not a violation of the prohibition against coerced confessions but rather a violation of the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Solicitor General, in his *Amicus* Brief in *Sykes*, argued that there was a significant distinction between that case, where there was "no claim that the confession was involuntary and no suggestion that an innocent man may have been convicted" (*Amicus* Brief at 19) and the cases of *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Fay v. Noia*, 372 U.S. 391 (1963) where the rights involved "cut directly to the heart of the fairness of the trial proceedings." (*Amicus* Brief at 15.)

Respondent Bell submits that there is merit to the distinc-

tion which the Solicitor General drew in *Davis* and *Sykes*, even though the United States has taken a different position in the case at bar. In each of the cases from *Davis* to *Sykes*, the rights involved were not "fundamental." Indeed, in *Sykes*, Mr. Justice Stevens, is in his concurring opinion, observed that "there is clearly no basis for claiming that the trial violated any standard of fundamental fairness." *Id.* at 97. In none of those cases did the issue have a "bearing on the basic justice of his incarceration," *Stone v. Powell*, 428 U.S. 465, 491, n. 31 (1976), or the guilt/innocence determining process.

Here, the error related to the burden of proof upon the major issue under which the jury was to determine guilt or innocence. A proper instruction upon the burden of proof is fundamental to the truth-finding function of the jury. *e.g., Ivan v. New York*, 407 U.S. 203 (1972); *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Consequently, the procedural default rule of *Sykes* should not apply.

Though the appropriateness of applying a constitutional plain error rule has not been decided by this Court, at least there Justices have indicated that such a standard might be appropriate. *Wainwright v. Sykes, supra* at 95 and 99 (Stevens, J., concurring and White, J., concurring); *Estelle v. Williams, supra* at 514, n. 2 (Powell, J., concurring). Such an approach would be consistent with this Court's power to review plain errors which were not challenged in the courts below if necessary to prevent "fundamental unfairness." *Wood v. Georgia,* U.S. , *49 U.S. L.W. 4218, 4219, n. 5 (1981). See also* Supreme Court Rule 34.1(a).

This plain error standard has been recognized by the lower courts in habeas corpus proceedings. *E.g., Carr v. Alabama*, 586 F. 2d 462, 465 (5th Cir. 1978). *See Williams v. Zahradnick*, 632 F. 2d 353, 360 (4th Cir. 1980). For

example, *Berrier v. Egeler*, 428 F. Supp. 750 (E.D. Mich. 1976), *aff'd* 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 95 (1978), involved an unobjected-to erroneous jury instruction on the issue of self-defense. The District Court found the shifting of the burden of proof to be "plain constitutional error." 428 F. Supp. at 752. On appeal the Sixth Circuit reviewed the issue under "plain error" precisely because the claim touched upon "the central issue of guilt or innocence." 583 F. 2d at 522.

This seems to be the very point Judge Celebrezze made in the panel decision below:

> "...denying to a defendant a trial under what the Ohio Supreme Court has concluded to be the proper allocation of the burden of proof amounts to a denial of due process." 646 F. 2d at 1129 (A. 34).

If a constitutional plain error standard is applied then a number of factors coalesce to indicate that this is a proper case to grant relief. First, the right to have the state prove guilt beyond a reasonable doubt and not to be required to prove one's innocence is a fundamental right of the highest order. *E.g., In re Winship, supra,* and *Hankerson v. North Carolina, supra.* Second, the error here directly affected the jury's ability to accurately determine whether the accused was innocent or guilty. Third, the error is shifting the burden of proof was one of commission and not simply ommission. *Compare Sandstrom v. Montana, supra* with *Henderson v. Kibbe,* 431 U.S. 145 (1977). Fourth, the State of Ohio, by statute, had specifically placed upon the trial court the duty of giving proper instructions to the jury. See R.C. 2945.11. Fifth, there was no conceivable benefit to the defendants in not objecting to the jury instructions. With all these factors combined, if there is no "plain constitutional error" here, then none can ever be said to exist.

2. Petitioner Perini's Failure to Create a Record and Waiver of the Sykes Defense

a. The Record is Inadequate to Support a Sykes Defense.

Rule 5 of the Rules Governing Section 2254 cases states:

> ". . . There *shall* be attached to the answer such portions of the transcript as the answering party deems relevant." (Emphasis added.)

Mr. Perini failed to make any portion of the transcript of Mr. Bell's trial a part of the record in the District Court. (Decision of District Court, A. 51, n. 3; Pets.' Brief at 6, n. 4.) Consequently, there is nothing in the record to demonstrate Petitioners' claim that Respondent Bell's trial counsel failed to object to the improper jury instruction.

Each party to an action bears the burden of making a proper record to support its claim. *E.g., Thompson v. Gaffney*, 540 F. 2d 251 (6th Cir. 1976). As the Eighth Circuit has concluded:

> "The burden of pleading and proving waiver of these constitutional claims falls on the government. (Citations omitted) Because a finding of waiver bars even a meritorious claim for habeas corpus relief, the government's burden is a heavy one." *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974).

Accord, In re Kravitz, 488 F. Supp. 38, 46 (M.D. Pa. 1979) (burden on custodian to make record on claimed procedural default).

Further, a reviewing court should not pass upon issues for which there is no support in the record. *See, e.g., Johnson v. Henderson*, 509 F. 2d 121, 122 (5th Cir. 1975). The Ninth Circuit has emphasized that "(a)n allegation in an appellate brief does not substitute for the necessary pleadings in a Section

2254 proceeding." *Wacht v. Cardwell*, 604 F. 2d 1245, 1247 (9th Cir. 1979). Nor can Appellate Rule 10(e) be utilized to submit documentary materials to the Court of Appeals which were not made part of the record in the District Court. *E.g., United States, ex rel. Kellogg v. McBee*, 452 F. 2d 134 (7th Cir. 1971); *Collins v. Wilson*, 368 F. 2d 995, 997 (9th Cir. 1966).

Having failed to support his factual predicate for his *Sykes* defense, Mr. Perini is barred from asserting that claim.

b. Waiver of the Sykes Defense

As set forth in the Statement of the Case, the *Sykes* claim was never raised in the District Court and was raised for the first time in Mr. Perini's Answer Brief in the Sixth Circuit Court of Appeals. It is well-established that generally a reviewing court should not consider an issue not raised below. *E.g.., Singleton v. Wulff*, 428 U.S. 106, 120 (1976).[25] The Ninth Circuit explained the reason for the rule was that:

> ". . . It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below." *Partenweederei, Ms. Belgrano v. Weigel*, 313 F. 2d 423, 425 (9th Cir. 1962).

It is clear that this rule applies to the Government as well as to habeas corpus petitioners. *E.g., Robinson v. Berman*, 594 F. 2d 1, 3 (1st Cir. 1979); *Hopkins v. Jarvis*, 648 F. 2d 981, 983, n.

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[25]Obviously, this rule will allow for an exception in the case of a manifest injustice. For example, where a District Court ruling properly relies upon a state Supreme Court decision, the Circuit Court may reverse where the state Supreme Court ruling is overruled during the pendency of the appeal. *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

2 (5th Cir. 1981); and *Messelt v. State of Alabama*, 595 F. 2d 247 (5th Cir. 1979).

This view accords with the applicable rules of procedure. Rule 11 of the Rules Governing Section 2254 proceedings incorporates the Federal Rules of Civil Procedure where applicable and not inconsistent. Rule 8(c) of the Federal Rules of Civil Procedure requires that the answering party "shall set forth affirmatively" all affirmative defenses, including the defense of "waiver". The failure to so plead is considered a bar to the right to assert the defense. See *West's* Federal Practice Manual, Section 7975 (1979).[26]

Recent decisions by this Court also support this view. For example, in *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court refused to consider a *Sykes* claim where the respondent failed to raise it in either the district court or the court of appeals. This refusal was based upon considerations of "judicial efficiency" since a determination of *Sykes* issues may turn upon factual findings on questions of state law, *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980).

In *Estelle v. Smith*, ____ U.S. ____, 68 L. Ed. 2d 359, 372, n. 12 (1981), this Court rejected the government's attempt to raise the claims where it was first raised in a motion for new trial before the District Court. In so doing, this Court adopted the reasoning of the Fifth Circuit, which included the following:

> "(I)n the habeas proceeding in federal district court, the state did not raise this argument in the pleading or at any time until it moved for a new trial. Judge Porter held that this constituted a waiver, see *Smith v. Estelle*, 445 F. Supp. 647, 659 (N.D. Tex. 1977), and we are not disposed to disagree." *Smith v. Estelle*, 602 F. 2d 694, 708, n. 19 (5th Cir. 1979).

[26]Appellate courts generally will not consider even claims raised for the first time in a reply brief in the District Court. *See e.g., Jennings v. Casscles*, 568 F. 2d 229, 233-34 (2nd Cir. 1977); and *McKinney v. Wainwright*, 488 F. 2d 28, 29, n. 1 (5th Cir. 1974). *See also Reinhart v. Brewer*, 561 F. 2d 126, 129 (8th Cir. 1977).

These principles apply *a fortiori* in Mr. Bell's case and should bar an application of *Sykes* to his case.

3. The Inadequacy of the State Grounds

The existence of a state "contemporaneous objection rule" does not, in and of itself, preclude consideration of an unobjected-to error under *Sykes*. Rather, a determination must be made as to the "adequacy" of the asserted state grounds. *Sykes, supra* at 78-79. In resolving that question in *Sykes*, the Court cited *Henry v. Mississippi*, 379 U.S. 443 (1965) for the proposition that a state procedural rule could be an adequate and independent state ground only if "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.* at 83, n. 8. *See also Ulster County Court v. Allen*, 442 U.S. 140 (1979).

The "adequacy" of the alleged independent ground is a matter of federal law. *E.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458 (1958); *Sykes, supra* at 88. Further, the inquiry into the adequacy of the state grounds must be made on an individual basis:

> "In *every case* we must inquie whether the enforcement of a procedural forfeiture serves such a state interest." *Henry, supra* at 447. (Emphasis added)

This requirement has been followed by the post-*Sykes* decisions of the lower courts:

> ". . . our cases make it clear that we cannot simply consider the (contemporaneous objection) rule in general, or in the abstract; we must see how it operates in the particular case before us." *Jurek v. Estelle*, 593 F. 2d 672, 683 (5th Cir. 1979) (Footnote omitted)

Application of these principles to the case at bar indicates that there are two separate and independent reasons why the state's

interest in these cases is inadequate to legitimize the preclusion of these claims from consideration by the federal courts.

FIRST. The State cannot "avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support." *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). *See also Williams v. Georgia*, 349 U.S. 375 (1955).

In this case, as in *Williams, supra*, Ohio has sought to establish a bar to federal review where its own courts are not barred from considering the issue. In *Williams*, this Court dealt with the Georgia Courts' refusal to hear an extraordinary motion for new trial. The issue sought to be raised by that motion had *not* been raised on direct review. Nonetheless, because this Court found that Georgia appellate courts had, in the past, heard "kindred issues raised in the same manner" (*Williams* at 383), the Court determined that it, too, had the jurisdiction to consider the substantive issue.

This type of analysis most recently used by the Court in *Ulster County, supra*, attests to the continuing vitality of *Williams*. The *Williams* analysis is applicable to this case even though *Williams* was on direct review. Whether a case is on direct or collateral review, the initial question must always be whether an independent and adequate state ground forecloses federal consideration of the claim.

In *Williams*, the Court focused, through an analysis of Georgia appellate cases,[27] on situations where the courts had granted review. These decisions revealed two common factors. First, in each instance, although presenting different substantive issues, the error was covered by a "contemporaneous

[27]It is interesting to note that *Williams* was concerned with the power of Georgia *Appellate* Courts to consider the substantive issue. The question was whether any Georgia court had exercised the discretionary power. *See Williams, supra* at 384-388.

objection rule." *Williams* at 384-388. Thus, the State's interest in mandating compliance with this procedural rule was the same. Second, the decisions revealed that the Georgia courts "possessed the power" to grant the motions in each instance. This Court reasoned that if the same interests existed in all of the cases and the state courts had the same power in each case, then "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." *Williams* at 388.[28]

In the case at bar, the Ohio courts have the same type of "discretionary power" through Ohio Criminal Rule 52(B), the "plain error" rule. Under this rule, Ohio courts are empowered to consider errors which were not objected to at trial if those errors affect "substantial rights." This is the primary vehicle to raise substantial issues where there has been no objection.[29]

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[28]An ostensibly similar situation to *Williams, supra* was presented in *Wolfe v. North Carolina*, 346 U.S. 177 (1960). The Court in *Wolfe, citing Williams with approval*, was concerned with the North Carolina Supreme Court's discretion to expand the record before it so as to include material which either party had neglected to transmit for review. In determining whether North Carolina courts had exercised this discretionary power, the Court found that those courts "had consistently and repeatedly held (they) would not make independent inquiry to determine the adequacy of the record before (them) . . ." *Wolfe, supra* at 188. This decision factually distinguished *Williams* by finding that the North Carolina Courts, though possessed with a discretionary power, had *never* exercised that power. In *Williams*, however, Georgia Appellate Courts *had* exercised that discretionary power. Likewise, *Wolfe* does not foreclose inquiry in this case. As established, *infra*, Ohio courts have determined not only that plain error is an available means for review, but that plain error exists in several different settings. Thus, *Williams* continues to be the primary focus for analysis.

[29]The appeals process and the motion for new trial are applicable to errors occurring on the record. Each of these means, however, gives Ohio courts the discretion to hear matters which affect substantial rights, despite the observance of an objection.

In *State v. Long*, 53 Ohio St. 2d 91, 372 N.E. 2d 804 (1978), the Ohio Supreme Court invoked a plain error analysis on precisely the same substantive and procedural questions presented here. The Court did not say that plain error review was unavailable. It simply found that on the facts presented there, the outcome of the trial clearly would not have been otherwise. *Long, supra* at 97. Thus, the Court recognized its discretionary power to review an unobjected-to error but declined to find such error on the facts presented.

Other Ohio Appellate courts have, however, utilized plain error to reach the substantive issue despite a procedural default. In *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1278 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); *State v. Gideons*, 52 Ohio App. 2d 70, 368 N.E. 2d 67 (1977); and *State v. Muscatello*, 57 Ohio App. 2d 231, 378 N.E. 2d 627, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 738 (1978), plain error was used to reach the merits. All three of these reported cases dealt with jury instructions. Thus, each case implicated the same contemporaneous objection interest as manifested here. Yet all three courts found they had the discretion to overlook that interest and indeed exercised that discretion. Similar situations can be found in *State v. Patton*, No. 35579 (8th Dist. Ohio Ct. App., March 3, 1977); *State v. Ballard*, No. 36204 (8th Dist. Ohio Ct. App., May 26, 1977); *State v. Davis*, No. 36142 (8th Dist. Ohio Ct. App., May 5, 1977); *State v. Burke*, No. 354 (4th Dist. Ohio Ct. App., January 30, 1978) (Addendum at 82, 24, 43, and 29, respectively).

These cases demonstrate that in situations involving the same state interest under Criminal Rule 30, Ohio courts have not hesitated to utilize plain error to grant relief. It is evident that the Ohio courts *have* not only had the discretion to review such errors but that they have utilized it. As in *Williams*, it is clear that Ohio courts have exercised plain error "in a proper case."

Various federal courts have recognized this concept and have looked to whether the particular state could utilize a discretionary means of review to reach unobjected-to claims. In *Berrier*, the Court was faced with a burden-shifting instruction on self-defense which had not been objected to. The Court found that the substantive issue could be reached since Michigan had a rule whereby issues of "fundamental injustice" could be considered without an objection. *Berrier, supra* at 522. *See also Krzeminski v. Perini*, 614 F. 2d 121, 123 (6th Cir. 1980) (treating Ohio's "plain error" rule).

The same result was reached in *Harless v. Anderson*, 504 F. Supp. 1135 (E.D. Mich. 1981). There the Court was again concerned with a burden-shifting instruction which had not been objected to. The Court reached the issue on the basis of Michigan's "manifest injustice" rule, CR G (1963) 516-2. The Court held:

> "If the State itself does not require a contemporaneous objection to preserve the issue on appeal, the federal court will not require such an objection." *Harless* at 1138-39.

See also Mitchell v. Smith, 633 F. 2d 1009, 1011 (2nd Cir. 1980):

> "When the State fails to give preclusive effect to their own procedural rules, comity concerns do not require that the federal courts give greater respect to their rules than State's themselves."

Accord, Quigg v. Crist, 616 F. 2d 1107, 1111, n. 4 (4th Cir. 1980); *Carr v. Alabama*, 586 F. 2d 462 (5th Cir. 1978); and *Wallace v. McKenzie*, 449 F. Supp. 802, 806-7 (S.D. W. Va. 1978).

Since the Ohio courts in this case could have exercised their discretion to consider the substantive issue *despite* the procedural default, the federal courts should be able to do no less. This same jurisdiction was used in *Ulster County v. Allen*,

supra. In *Ulster County*, the Court was concerned with whether New York had a contemporaneous objection rule which would bar federal review of the unobjected-to presumption. The Court's analysis dwelt on whether the New York courts could consider such an issue despite the absence of an objection. The Court found that the New York courts had the *discretion* "to consider and determine any question . . . which may have adversely affected the appellant *even if not previously objected to*." *Id*. at 150, n. 8 (emphasis added). Furthermore, the Court found that even if New York had a contemporaneous objection rule, the Court of Appeals had developed a judicial policy of reviewing "unobjected-to errors that affect a fundamental constitutional right." *Id*. at 151, n. 10. Considering the lessened effect New york had given its rule, the Court held:

> "But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *Id*. at 154.

Since Ohio has not interpreted Criminal Rule 30 to be an absolute bar to review, this Court has the power to do the same and may consider the substance of Respondent's claim.

SECOND. All contemporaneous objection rules are not created equal. The varying interests of both the state and the defendant in any given situation may result in a different judgment as to the "adequacy" of the asserted state grounds for preclusion. For example, the State's interest in requiring objections and maintaining finality is probably the greatest in situations involving guilty pleas. Generally such cases are not as carefully prepared as cases which actually go to trial; it will be difficult to find witnesses after time has transpired; and there will be no transcript of testimony of unavailable witnesses which can be utilized at any subsequent trial as allowed under

Ohio v. Roberts, 448 U.S. 56 (1980). See Westin, "Forfeiture of Constitutional Rights," 75 Mich. L. Rev. 1214, 1237-49 (1977). Nevertheless, guilty pleas are subject to collateral attack because of the fundamental nature of the rights involved.

Like the guilty plea example, the right involved here is a fundamental one. In contrast to the grand jury example, *e.g. Davis v. United States, supra*; and *Francis v. Henderson, supra*, the Respondents here had everything to lose and nothing to gain by "withholding" an objection to the jury instruction. No possible tactical advantage could have been gained by defense counsel's failure to object here or by accepting a higher burden of proof than that required by law. No allegation has been made that any trial counsel even considered the possibility of raising any objection to the jury instruction, let alone that they improperly withheld the objection.[30] To the contrary, counsel for the Petitioners has specifically admitted that no such improper motives should be attributed to trial counsel:

> "To say that Ohio *counsel* and courts had a *justifiable reliance* on past precedent would be an understatement at best." (Petitioner Engle's Petition for Re-hearing *En Banc* in the Sixth Circuit, pp. 4-5) (emphasis added).

Thus, both the fundamental nature of the right involved and the total lack of any conceivable tactical advantage places Respondents' interest in federal habeas corpus review in its highest position.

In contrast, the interests of the state which might, in other circumstances, support a rule of preclusion are not applicable here. The interest of the state in enforcing a contemporaneous objection rule at trial generally fits into three categories: (1) insuring the timely taking of testimony on issues of fact, pri-

[30]If such an allegation had been properly raised, then an evidentiary hearing in the Federal District Court should have been held. *See Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980); and *Henry v. Mississippi, supra* at 450.

marily relating to the suppression of evidence; (2) preventing "sand-bagging" by trial counsel so as to insure that the trial is the "main event" of the criminal proceedings; and (3) "finality", creating incentive to have a trial that is as error free as possible so as to avoid the necessity of having new trials. See Pets.' Brief at 9; Solicitor General's *Amicus* Brief at 14-15. *See also State v. Childs*, 14 Ohio St. 2d 56, 62, 236 N.E. 2d 545, 549 (1968); and *State v. Williams*, 51 Ohio St. 2d 112, 117, 346 N.E. 2d 1364 (1977), vacated in part on other grounds, *Williams v. Ohio*, 439 U.S. 955 (1978).

The first interest, insuring the timely taking of testimony with respect to preliminary matters such as suppression motions, *e.g., Wainwright v. Sykes, supra*, has no application here at all because the error relates to an erroneous jury instruction. The second interest, in avoiding sand-bagging by trial counsel, appears to be the major concern articulated by the Ohio Courts. *E.g., State v. Childs, supra* and *State v. Williams, supra*. But, upon the facts of these cases, there is no suggestion that counsel could have obtained any tactical advantage by accepting the burden of proof upon the affirmative defense or by "holding" an objective in reserve. Further, given the admission by Petitioners' counsel in the Circuit Court below that any failue to object could have been based upon "justifiable reliance" upon past precedent, it is apparent that this interest is not implicated in the cases at bar.

The third interest, finality, must be examined in the context of the state interest in avoiding retrials. It is evident that the State of Ohio has not sought to create an absolute bar since it allows review of unobjected-to errors upon a plain error standard. Ohio Criminal Rule 52. Equally as important is the statement of the Ohio Supreme Court in *State v. Williams, supra*, indicating that the failure to object would preclude review where:

> ". . . a party complaining of the trial court's judgment *could have called*, but did not call, to the trial court's attention (the error) at a time when such error could have been *avoided or corrected* by the trial court." *Id.* at 117 (citations omitted) (emphasis added).

As developed below in the arguments concerning inadvertence and futility, Ohio trial counsel could not realistically have called the error to the trial court's attention and, even if they had, the trial courts could not reasonably have avoided or corrected the pre-*Robinson* error. Consequently, by its own criteria, the interest of the state is not served here.

This point is made by the only Ohio Court to specifically consider the State's interest in enforcing its contemporaneous objection rule in pre-*Robinson* cases:

> ". . . Rule 30 . . . contemplates calculated risks and tactical choices, and at the same time, guards against nonfeasance and misfeasance. In fact, the rule prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." *State v. Hamilton*, No. 5088 (2nd Dist. Ohio Ct. App., December 9, 1976) at 3 (Addendum at 48, 50) (emphasis added.)

A similar conclusion was reached by the panel decision outlined by Senior Judge Peck in *Isaac v. Engle, supra* at 1126 (A. 30). Given the fact that this conclusion is based upon an interpretation of State law, the decision of the Court of Appeals on this issue may be entitled to preferential consideration. *See* Respondent Hughes' Brief on this point at 16-17.

It is important to emphasize that in the case at bar, unlike the *Davis/Sykes* line of cases, there was no tactical advantage to be gained by withholding the objection and accepting the burden of

proof upon the self-defense issue. Without such an incentive, "it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed." Friendly, "Is Innocence Irrelevant . . . .", 38 U. Chi. L. Rev. 142, 158 (1970). In Ohio even a defendant who must seek vindication from the Ohio Supreme Court can reasonably expect a decision within two years of incarceration. *E.g., State v. Harris*, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979); *State v. Sturm*, 66 Ohio St. 2d 483, ____ N.E. 2d ____ (1981). In Mr. Bell's case six years have now passed and he still has not obtained his freedom. The delay caused by having to pursue federal remedies was so great that both Mr. Hughes and Mr. Isaac have full releases from the state of Ohio even though the litigation continues. Nor are their experiences unique. *E.g., Jones v. Jago*, 428 F. Supp. 405 (N.D. Ohio 1977), *aff'd*, 375 F. 2d 1164 (6th Cir. 1978), *cert. denied* 439 U.S. 883 (1978) (incarceration for over six years).

This prospect of years of additional incarceration gives both the accused and counsel incentive of the greatest possible magnitude to present such claims to the state courts at the earliest opportunity. It insures that the trial will be the "main event" and gives more than adequate protection to the state's interest inducing counsel to attempt to reform the law and to aid the trial court in attempting to produce error-free trials. Any further "sanction" within the context of the case at bar would not only be unnecessary but also grossly disproportionate to the alleged "offense" against the State's procedural rule. Since the State's articulated interest in invoking the contemporaneous objection rule is already adequately protected, *Sykes* has no application here.

B. Application of the Contemporaneous Objection Rule to these Cases would violate Procedural Due Process, Substantive Due Process and Equal Protection

1. Procedural Due Process

It is well established that the "state action" requirements of both the Fourteenth Amendment are met even if that action is taken through the state judicial branch. *E.g., Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Fundamental fairness guaranteed by procedural due process, requires that:

> "In all instances the state must adhere to previousy declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken." Nowak, Rotunda & Young, HANDBOOK ON CONSTITUTIONAL LAW 477 (1978) (emphasis added).

It is conceded that the instructions in these cases erroneously required the respective Respondents to prove that they had acted in lawful self-defense. If the Solicitor General of the United States is correct in his assertion that the right accrued solely from the passage of the statute and not from a change effected by *State v. Robinson, supra*, then procedural due process was violated.

Under this view, the statute — pertaining to the important question of the quantum of proof — was one of the "previously declared rules" which the state must adhere to in adjudicating the claim that these Respondents violated Ohio's criminal statutes. Yet, the instructions to the jury changed the rules; altered the quantum of proof; and thereby prejudiced the accused.

It is quite clear that this action could not have been taken by the legislature, since it would violate the *ex post facto* clause. *E.g., State v. Jones, supra*. The same protection is afforded against such judicial actions by the due process clause. *See* Tribe, *American Constitutional Law* 478 (1978).

2. Substantive Due Process

Fourteenth Amendment due process prohibits state action that is "arbitrary" or "capricious." Stated in other terms, the due process clause requires that state action "have a rational relationship to a legitimate end of government." Nowak, Rotunda & Young, *supra* at 404. As developed in more detail below, *none* of the legitimate interests a state may have are furthered by invocation of the contemporaneous objection rule in the cases at bar. See *Isaac, supra* at 1126 (panel decision); *Isaac, supra* at 1136-37 (Jones J., concurring). This same conclusion was reached by the Ohio Court of Appeals in *State v. Hamilton*, No. 5088 (2nd Dist.Ct. App., December 9, 1976), at 3, in finding that Rule 30

> ". . . prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added) (Addendum at 50).

Accordingly, the application of Ohio Criminal Rule 30 to any of the cases at bar is not in furtherance of any legitimate state interest and violative of the due process clause of the Fourteenth Amendment.

3. Equal Protection

The Fourteenth Amendment also guarantees equal protection of the law. While the state may create classifications, such classification must be rationally related to the furtherance of some permissible state objection. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). Moreover, when such classification in-

fringes upon a fundamental right, it can be justified only upon a showing of a compelling state interest. *See Shapiro v. Thompson, supra*.

In the interim between *Robinson* and *Humphries*, some defendants whose counsel had *not* objected to the jury instructions nevertheless received new trials. It can be documented that at least five individuals who made no objection at trial but assigned the burden of proof issue as an error on appeal were granted new trials under Ohio's plan error rule.[31] In at least two other cases, the accused obtained leave to file supplemental briefs in the State Court of Appeals raising the claim that the instruction on self-defense had been erroneous and obtained new trials in spite of their failure to object.[32] In *State v. Patton*, No. 35579 (8th Dist. Ct. App., March 3, 1977) (Addendum at 82), the accused received a new trial even though he failed both to object at trial and assign the burden of proof issue on self-defense as error on appeal. This was the result of the Court of

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[31]*State v. Hamilton, supra* (self-defense); *State v. Davis*, No. 36142 (8th Dist. Ct. App., May 5, 1977) (self-defense) (Addendum 43); *State v. Hudson*, No. 35562 (8th Dist. Ct. App., May 17, 1977) (intoxication) (Addendum 56); *State v. Muscatello*, 57 Ohio App. 2d 273, 378 N.E. 2d 738, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 627 (1978) (mansslaughter); and *State v. Gideon, supra* (self-defense).

It is significant to note that in the *Muscatello* case the error was premised on this Court's decision in *Mullaney v. Wilbur, supra*. Even though *Mullaney* was decided on June 9, 1975, the trial in *Muscatello* did not occur until June 23, 1975 (57 Ohio Ap. 2d at 232; 387 N.E. 2d at 631). The state interposed the defense that the accused failed to object. The Court of Appeals found plain error and apparently determined that it was not signigicant that *Mullaney* was decided prior to the date of the trial. The Ohio Supreme Court affirmed this decision without speaking to either of those points.

[32]*State v. Ballard*, No. 36204 (8th Dist. Ct. App., May 26, 1977) (Addendum 24); and *State v. Rivera*, No. 35335 (8th Dist. Ct. App., January 20, 1977) (Addendum 93).

Appeals raising the issue *sua sponte* and finding it to be plain error. In *State v. Burke*, No. 354 (4th Dist. Ct. App., January 30, 1978) (Addendum at 29), involving an affirmative defense pertaining to the carrying of a concealed weapon, the court found reversible error even though there was no timely objection and even though the appellate decision was rendered after both *Robinson* and *Humphries*. Further, in *State v. Campbell*, No. C.A. 1763 (5th Dist. Ct. App., July 25, 1979) (Addendum at 36), another carrying a concealed weapons case, the Court found plain error in the absence of a failure to object on the burden of proof issue even though the trial itself occurred after both *Robinson* and *Humphries*.

The arbitrariness of Ohio's application of both its contemporaneous objection rule and its plain error rule can also be illustrated by other cases in which the plain error rule has been utilized to require a new trial. For example, the Ohio courts have found plain error where a prosecutor attempted to use the defendant's post-arrest silence for impeachment purposes. *State v. Eiding*, 57 Ohio App. 2d 111, 385 N.E. 2d 1332 (1978); where the jury was not specifically instructed on all the elements of the crime, *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1378 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); and where the prosecuting attorney made improper remarks in argument implying that if the accused were acquitted the pecuniary interest of the jury as taxpayers would be affected, *State v. Hill*, 52 Ohio App. 2d 393, 370 N.E. 2d 775 (1977).

As important as the rights in those cases were, they did not rise to the same magnitude as the shifting of the burden of proof upon an issue that makes the difference between guilt and innocence. It is irrational to recognize plain error in cases such as those set forth above, and to refuse to do so in cases in which the error goes directly to the heart of the truth-finding function of the jury such as Mr. Isaac's.

These cases serve to illustrate that the granting or denial of benefits under *Robinson* had nothing to do with the merits of any individual case and was not governed by any rational scheme. To the contrary, it was a "game of chance" in which some, who were lucky enough to be tried at a certain time or in a certain appellate district, were granted important benefits that were denied to others.

Having failed to meet the rational basis test, it necessarily follows that the state cannot show the compelling state interest required here because the fundamental right of liberty is implicated. Accordingly, the right to equal protection has been violated and the judgment of the Court below should be affirmed.

C. If *Sykes* Were Applied to the Cases at Bar, Respondents Are Within the "Cause" and "Prejudice Standards

1. "Cause or Prejudice"

Though the initial decisions by this Court on procedural defaults seemed to indicate that collateral review would be available only upon a showing of both cause *and* prejudice, there is language in this Court's opinion in *Sumner v. Mata*, ____ U.S. ____, 49 U.S.L.W. 4133, 4135 (1981) suggesting that review would be available if a showing was made of either cause *or* prejudice. Such an approach would be consistent with language in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), *quoted with approval* in *Davis v. United States*, 411 U.S. 233, 244 (1973) indicating that the degree of prejudice was one of the aspects to be considered in determining the existence of "cause." It would also be a separate method of applying a "constitutional plan error rule".

Hence, if *Sumner v. Mata* was intended to establish a

"cause" *or* "prejudice" test, then Mr. Bell submits that his unequivocal showing of prejudice alone should entitle him to relief.

2. Ineffectiveness as Cause

The change in Ohio's approach to the burden of proof may be viewed as having come from R.C. 2901.05 itself, *State v. Robinson, supra* at 110, 351 N.E. 2d at 93; *State v. Humphries, supra* at 101, 364 N.E. 2d at 1357, or from a "gloss" placed upon that statute by *Robinson*. *E.g., State v. Robinson, supra* at 116 (Corrigan, J., dissenting).

Since the right to effective assistance of counsel requires knowing the law, *e.g., People v. Iberra*, 386 P. 2d 478 (Cal. 1963) and that actions taken (or not taken) be a product of professional judgment rather than neglect or ignorance, *Marzullo v. Maryland*, 561 F. 2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978), it necessarily follows that any counsel who either was unaware of the statute's existence or misinterpreted its meaning was ineffective. *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977), Nor would insulation from such ineffectiveness come from the "usual practices" of the profession if such practice simply constituted "mass negligence." *E.g., The T.J. Hooper*, 60 F. 2d 737, 740 (2nd Cir. 1932). This is particularly true in a criminal case where, unlike civil matters, monetary damages cannot make the client whole.

Since ineffectiveness is "cause" under *Sykes, e.g., Sincox v. United States*, 571 F. 2d 876, 879-880 (5th Cir. 1978) and Pets.' Brief at 15, if the right in question is determined to have come from the statute itself then cause has been shown.

3. Futility as Cause

The state's primary interest in enforcing the contemporaneous objection rule is in creating error-free trials. It matters little, in terms of "finality" whether a new trial is the result of a decision by a state appellate court or a federal district court. Whatever the state's interest in having its own appellate courts consider possible errors, that interest is adequately protected by the exhaustion of state remedies requirement. Consequently, the question of whether "futility" can serve as cause under *Sykes* must be resolved by considering its effects upon the state's interest.

At the outset, it is important to emphasize that "futility" is a generic term for at least three different situations. The first of those situations is what Respondent Hughes has termed "futility in fact." (See Resp. Hughes' Brief at 15-21). This type of futility exists when counsel's making or not making an objection has no arguable bearing upon the prospects for avoiding error at trial.

Of course, it will usually be impossible to establish futility with such certitude. But the procedural default principle, like the exhaustion doctrine, is based upon comity. *Compare Sykes, supra* with *Fay v. Noia*, 372 U.S. 391, 418-420 (1963). Just as comity does not require vain acts for exhaustion purposes, neither should it require vain acts for procedural default purposes. In the exhaustion context, the mere "possibility" that a state remedy may be available is not enough to foreclose federal review when such a remedy has not been pursued. *E.g., Collins v. Perini*, 594 F. 2d 592, 593 (6th Cir. 1979) (post-conviction foreclosed by *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967)).

A similar standard is applicable to the comity requirements under the procedural default rule. Mere speculation as to the possible prevention of error at trial is not enough. Rather, if it

seems reasonably likely that any such objection would not serve this purpose, then "actual" or "practical" futility can be said to exist. A demonstration of "practical futility" would, like futility in fact, indicate both that enforcement of the procedural default rule was not legitimate and that cause existed. *E.g., Myers v. Washington*, 646 F. 2d 355 (9th Cir. 1981); *United States v. Frady*, 636 F. 2d 506, (D.C. Cir. 1980), *cert. granted* ____ U.S. ____, 49 U.S.L.W. 3962 (June 29, 1981).

A determination of whether it was, as a practical matter, futile to object in a given situation could be made by reference to objective indicia of futility. First, consideration should be given to whether the instruction in question was a "standard", well accepted one. This was true in the case at bar. See 4 *Ohio Jury Instructions*, Section 409.60.

Second, reference should be made to the treatment given to identical or similar objections by trial courts at the time. Here there are seven documented cases in which an objection was entered to jury instructions shifting the burden of proof to the accused on "affirmative defenses."[33] In each case the objection was overruled and the jury improperly instructed. One Ohio Appellate Court indicated that it knew of no pre-*Robinson* trial in which the jury had been properly instructed with respect to the burden of proof on affirmative defenses. *State v. Burke*, No. 354 (4th Dist. Ct. App., Pickaway Cty., January 30, 1978) at 7, n. 4 (Addendum 35).

[33]*E.g., State v. Robinson*, 48 Ohio App. 2d 197, 200, 356 N.E. 2d 725, 728 (1975), *aff'd* 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) (self-defense, Franklin County); *State v. Matthews*, 47 Ohio St. 2d 119, 351 N.E. 2d 98 (1976) (self-defense, Franklin County); *State v. Long*, 53 Ohio St. 2d 91, 94, 372 N.E. 2d 804, 806 (1978) (self-defense, Summit County); *State v. Slone*, 45 Ohio App. 2d 24, 29, 340 N.E. 2d 413, 418 (1975) (self-defense, Franklin County); *State v. Gideons*, 52 Ohio App. 2d 70, 76-77, 368 N.E. 2d 67, 70-71 (unclear whether proper objections — self-defense, Cuyahoga County); *State v. Johnson*, 11 O. Ops. 3rd 338, 340 (1978) (insanity, Cuyahoga County); *State v. Brewster*, 1 Ohio Ops. 3rd 372, 373 (1976) (self-defense, Franklin County).

Third, consideration should be given to the assessment of the existence of "futility" by those courts which are in the best position to judge the likelihood of an objection producing its desired effect. In the present cases, the Ohio Court of Appeals for the Second District has indicated that such an objection would have been a "vain act." *State v. Hamilton, supra* at 3 (Addendum at 50). An identical conclusion was reached in the panel decision authored by Senior Judge Peck below. *Isaac v. Engle, supra* at 1126 (A. 30).

Fourth. Since appellate courts may, institutionally, be more sensitive to change, their lack of receptiveness to a given legal argument may be an important indication of futility. In Ohio, decisions which conflict with the later Ohio Supreme Court decision in *Robinson* were rendered not only by four appellate courts[34] but also by the State Supreme Court itself. *State v. Rogers*, 43 Ohio St. 2d 28, 330 N.E. 2d 674 (1975), *cert. denied* 423 U.S. 1061 (1976).

These objective indicators all suggest that at the time of the trials of these three Respondents it would, as a practical matter, have been futile to make an objection. Hence, no legitimate state interest is furthered by precluding review of the merits of their habeas corpus claims.

There is, of course, a third type of futility that is the basis for much of the argument in the Solicitor General's brief. That aspect of futility focuses not upon factual or actual futility, but rather upon trial counsel's perception of such futility. The So-

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[34]*State v. Smith*, 49 Ohio App. 2d 388, 361 N.E. 2d 267 (1976) (3rd Dist., insanity); *State v. Jones*, 49 Ohio St. 2d 166, 359 N.E. 2d 1374 (1977) (indicating the Sixth District had incorrectly held the burden of proof could be placed on the accused); *State v. Ladany*, No. 7534 (9th Dist., January 22, 1975) (intoxication) (Addendum at 66); *State v. Morow*, No. 7757 (9th Dist., October 22, 1977) (self-defense) (Addendum at 77); *State v. Slone*, 45 Ohio App. 2d 24, 340 N.E. 2d 413 (1975) (10th Dist., self-defense).

licitor General argues against futility as cause when it is based upon a *judgment* by counsel that it would be futile to raise any such objection.[35] Of course, such an argument is not pertinent to the instant cases, since there is nothing in the record to suggest that any alleged procedural default was based upon the type of decision-making posited by the Solicitor General. *See* note 30, *supra*.

4. Inadvertence as Cause

While ineffectiveness will always be cause, cause can be established short of proving ineffectiveness. Because lack of effective assistance of counsel provides an independent basis for obtaining relief, to "closely equate" (Pets.' Brief at 15) cause and ineffectiveness would be to render *Sykes* a nullity. *Jurek v. Estelle*, 593 F. 2d 672, 683, n. 19 (5th Cir, 1979). Contrary to the claims of the Solicitor General, this does not call for a return to the "deliberate bypass" rule. Rather, it serves to implement the decisions of this Court from *Davis* to *Sykes* which indicate that the contemporaneous objection rule will be given preclusive effect when the failure to object was based upon a tactical or strategic decision made at trial. Indeed, the lower courts have generally applied *Sykes* by distinguishing between situations where the failure to object was a product of tactics and those situations where it was a result of inadvertence

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[35]One by-product of rejecting as cause counsel's reasonable determination that raising an issue would have been futile would be to give incentive to counsel to raise all conceivable errors, no matter how tenuous, in order to protect against future developments in the law. *Myers v. Washington*, *supra*, at 360. This is not only counterproductive but "borders on the absurd." *United States v. Frady*, *supra* at 512 and 513, n. 17.

or neglect or impossibility.[36] This approach seems to have been approved in *Smith v. Estelle*, ____ U.S. ____, 49 U.S.L.W. 4490, 4493, n. 12 (1981) *aff'd* 602 F. 2d 694 (5th Cir. 1979).

Under this interpretation, one aspect of cause is the lack of a firm legal basis upon which to make the objection. *Myers v. Washington, supra* at 359-360; *United States v. Frady, supra* at 512. This Court held that the mere theoretical possibility of obtaining reversal on appeal is not sufficient to require an objection:

> ". . . a failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966).

The lack of an adequate legal basis upon which to make such an objection was set forth in detail in the panel decision in *Isaac v. Engle, supra* at 1126 (A. 29-30). In addition to the factors set forth there, consideration should also be given to the following: (1) the then new statute was "not free of ambiguity", *Isaac, supra* at 1131 (A. 2) and, unlike statutes in other states, did not "expressly" require the prosecution to negate affirmative defenses. *Muscatello, supra* 57 Ohio App. 2d at 249, 387 N.E. 2d at 640; (2) unlike the 1971 Legislative Committee Report cited in *Robinson, supra*, 47 Ohio St. 2d at 110-111, n. 10, 351 N.E. 2d at 93-94, n. 10, the 1974 Committee Notes to R.C. 2901.05 make no reference to a change in the burden of proof; (3) an

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[36] *E.g., Jiminez v. Estelle*, 557 F. 2d 506 (5th Cir. 1977) (counsel ignored grounds for objection or did not comprehend their importance); *Sincox v. United States*, 571 F. 2d 876 (5th Cir. 1978) (ineffectiveness); *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979) ("attorney misfeasance"); *Collins v. Auger*, 577 F. 2d 1107 (8th Cir. 1978), *cert. denied* 439 U.S. 1133 (lack of knowledge of facts or law); *Graham v. Maryland*, 454 F. Supp. 643 (D. Md. 1978) (non-tactical explanation for failure to object); and *Tolliver v. Wyrick*, 469 F. Supp. 583 (W.D. Mo. 1979) (lack of knowledge of necessity for multiple objections).

article on the legislative history of the bill enacting the statute in question, authored by its two co-sponsors, gives no indication of any such change, Norris and Lehman, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974); and (4) the only pre-*Robinson* article treating this issue concludes that the burden of proof on affirmative defenses remained on the defendant, Comment, "Affirmative Defenses in Ohio After *Mullaney v. Wilbur*," 36 Ohio St. L. J. 828, 829-830 (1975).

Counsel for Petitioner Perini perhaps summed this situation up best when he indicated that "(i)n a real sense" the decision in *Robinson* "was not foreshadowed either by the terms of O.R.C. Section 2901.05 nor interim decisions of the Ohio Supreme Court." (Cert. Pet. at 8.) Relevant to the questions of both inadvertence and futility is the statement of Petitioner Engle that:

> "The decision in Robinson was a *clear break* with practice in Ohio and was not foreshadowed so as to make its result inevitable . . . . *To say that Ohio counsel and courts had a justifiable reliance on past precedent would be an understatement at best*." Petition for Rehearing En Banc in Sixth Circuit at 4-5 (emphasis added).

It was for reasons such as these that the Second District Ohio Court of Appeals concluded that the failure to object to an improper jury instruction prior to *Robinson* was "not based upon nonfeasance, misfeasance, or any tactical choice." *State v. Hamilton*, No. 5088 (2nd Dist. Ct. App., Dec. 24, 1976) (Addendum at 53).

What the Petitioners seek here is to set a higher standard of legal scholarship for the practicing bar than the Ohio Courts exercised when acting in their official capacity. In effect, the State of Ohio faulted trial counsel, and made clients suffer for that fault, when trial counsel either made no error, or, at the very

least, did nothing more than make the very same mistake that the State Supreme Court had made in *Rogers*.

Consequently, any failure to object to a jury instruction prior to *Robinson* was not the product of a strategic or tactical choice. Indeed, it was not the product of any choice at all. Rather, it was based upon a lack of information upon which to base the objection and constituted "cause" under *Sykes*.

5. Prejudice

The second prong of the *Sykes* test is "prejudice." As developed fully in the preceding discussions concerning the constitutional magnitude of the error and the doctrine of constitutional plain error, there can be no question that the error here was prejudicial. Whether the burden of proof standard was adopted by the State as a matter of state law or of constitutional requirement, the fact remains that the jury was misinformed as to the burden of proof upon the crucial matter which made the difference between guilt and innocence. Both the Ohio Supreme Court and the Federal Circuit Courts have recognized that such an error is prejudicial. *E.g.*, *State v. Chase*, 55 Ohio St. 2d 237, 243, 378 N.E. 2d 1064, 1068 (1978) and *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955 (1978). To suggest that no prejudice occurred in Mr. Bell's case is to blink at reality.

CONCLUSION

In the cases at bar, the jury was given improper instructions which shifted the burden of proof upon the major factual issue in dispute: self-defense. The "fault" for this error may lie with a number of individuals: perhaps the Legislature itself was at fault for not making its statute so clear that courts would not misun-

derstand their meaning; perhaps the Legislative Committee was at fault for failing to indicate in the notes to the code that this was a change when the new criminal code was enacted in 1974; perhaps the Ohio Judicial Conference was at fault for failing to revise their model jury instructions to conform to the new code; and perhaps the Ohio Supreme Court itself was at fault for setting forth its *dictum* in *State v. Rogers, supra*, which was later contradicted by *State v. Robinson, supra*. But to whomever the "fault" is attributed, it is clear that the confusion and the error was caused by the State of Ohio, acting either through its Legislature or its Courts. This is true even at the time of the trial — for Ohio Revised Code Section 2945.11 specifically enjoined the Court to correctly charge the jury upon "all matters of law necessary . . . in giving its verdict . . . ."

In spite of the fact that the error here was created by the State and injected into the trial by the State, the State of Ohio insists that the unfair trials should stand. When stripped to its essence, the argument of the State is nothing more than a claim that they repeated the error so many times (and thereby possibly convicted so many innocent individuals) that they cannot conveniently correct the mistake. The answer to this type of argument was aptly set forth in a different context some 160 years ago:

> "Then where is the justice of the law, and where is its boasted humanity? And for what good and purpose is it, that the arm of the law should be lengthened to strike the fatal blow, but made too short to save an unfortunate victim who is unjustly doomed to suffer? It is enough to ask the question, and every heart will respond that it should not be so." *Bob v. State*, 10 Tenn. 173, 177 (1826) (Haywood, J.).

Fortunately, this Court, acting under its authority to enforce the Fourteenth Amendment has the power to insure that it shall "not be so," by affirming the decision of the *en banc* panel below.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

KATHLEEN S. AYNES
P.O. Box 143
Twinsburg, Ohio 44087
(216) 425-8200

Counsel for Respondent Bell

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No. 80-1430

In the Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

LINCOLN ISAAC, Respondent

E.P. PERINI, Superintendent, Marion Correctional Institution, Petitioner

v.

KENNETH L. BELL, Respondent

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

HOWARD HUGHES, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HUGHES

RICHARD L. AYNES
Counsel of Record
J. DEAN CARRO
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751
Counsel for Respondent Hughes

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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HOWARD HUGHES

STATEMENT OF THE CASE

Respondent Howard Hughes concurs with Petitioner Engle's Statement of the Case (Petitioners' Brief at 7-8)[1] with two exceptions. First, Superintendent Engle maintains that the prosecution objected to the giving of the charge upon self-defense. (Pets.

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1. All subsequent references to the Petitioners' Brief will be abbreviated as "Pet.'s Brief."

Brief at 7) However an examination of the very pages of the record cited by Petitioner Engle (Hughes' State Trial Transcript 288-289; Joint Appendix 42)[2] reveals that the State Prosecutor did not object to charging the jury upon that issue. Rather, the prosecutor accepted the fact that the jury was to be charged upon the self-defense issue and used that fact as a basis to argue that under state law the accused was not entitled to instructions upon the lesser included offenses of aggravated murder and voluntary manslaughter.[3]

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2. All subsequent references to these materials will be abbreviated as "H.T." and "J.A.". The Appendix to the Certiorari Petition will be referred to as "A."

3. Under Ohio law evidence supporting a complete defense to the crime charged may preclude the jury from considering lesser included offenses. See generally State v. Nolton, 19 Ohio St. 2d 133, 249 N.E. 2d 797 (1969). It was Nolton that the prosecutor in Mr. Hughes' case cited in his argument on the objections.

For an example of the application of this doctrine, see the decision of the State Court of Appeals in Respondent Bell's case. (J.A. 18-20).

Second, Petitioner Engle claims that "Hughes' counsel specifically requested the charge on self defense." (Emphasis added) (Pet.'s Brief at 7.) But for purposes of clarity it is important to note that what Mr. Hughes' trial counsel did was to request that the trial court "charge" the jury on "self-defense."[4] At no time in the proceeding did Mr. Hughes' counsel request "the" charge which was in fact given to the jury, nor did he propose that Mr. Hughes should bear the burden of proof on that issue. To the contrary, trial counsel indicated:

> "First of all, may I say for the record that I am going to object to the entire charge in its entirety, but for one purpose. We are operating now under a new code in which many things are

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4. ". . . I would like to have the Charge of the lesser included offenses of voluntary Manslaughter, Murder and Self-defense . . ." (H.T. 288; J.A. 42).

uncertain." (H.T. at 350; J.A. 48.) (Emphasis added)[5]

At no stage in these proceedings has Mr. Hughes denied that there was sufficient evidence in the record to allow a properly instructed jury to return a verdict of guilty upon the issue of voluntary manslaughter. Likewise, Petitioner Engle has never denied that there was sufficient evidence presented at the trial to place the issue of self-defense properly before the jury. Both parties and the courts below have recognized that while detailed references to the record would allow arguments to be made, both pro and con, upon the question of guilt or innocence, such argument does little more than emphasize that this was a question for the jury. (See Pet.'s Reply Brief to Briefs in Opposition to Certiorari at 1.)

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[5]. Trial counsel's objection, when read in its entire context, seems to be directed toward other concerns. However, such a reading does not change the fact that trial counsel clearly stated "for the record" that he was objecting to the "entire charge in its entirety." (H.T. 350; J.A. 48.)

This being the case, it is unfortunate that the Amicus Curiae, United States, presents an inaccurate account of the evidence in Mr. Hughes' case.[6] (Brief of the United States 7 and 29, n. 31). A full examination of the evidence before the jury and the errors contained in the Magistrate's Report relied upon by the Solicitor General is set forth in "Petitioner [Respondent] Hughes' Memorandum on the Merits," pp. 4-13, docketed in the District Court on June 19, 1979.

At this stage in the proceedings it is sufficient to make six points in response to the Solicitor General's claims as to the status of

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6. In his statement of the case, the Solicitor General relies primarily upon the unfavorable Report and Recommendation of the Magistrate in the U. S. District Court. (J.A. 24-37.) It is significant to note that this Report was issued while Mr. Hughes was proceeding pro se and did not have the benefit of counsel to brief and argue his case. Mr. Hughes obtained counsel after the Report was issued but prior to the decision of the District Court. Counsel was able to point to no less than 11 major errors contained in that Report. See "Petitioner [Respondent] Hughes' Memorandum on the Merits" at 4-13 (docketed: 6/19/79). It is noteworthy that the District Court, while indicating it had considered the Report (A. 63), neither adopted the Report and Recommendation as its own nor incorporated any of the matters objected to in its own opinion.

the evidence in the record. First. The jury had before it evidence that Mr. Hughes was a respectable citizen and a contributing member of the community. He was a veteran of the United States Army who had served in the front lines in Korea for 16 months. (H.T. 242) During the course of that tour of duty, Mr. Hughes not only earned a combat infantry badge and a citation medal for service in Korea but also three bronze stars. (H.T. 242) At the end of service, he was honorably discharged from the Army, holding the rank of Corporal. (H.T. 243) He had no prior state or federal convictions (H.T. 276-277) and at the time of the incident had worked at the Chrysler Plant in Twinsburg, Ohio, for over 20 years. (H.T. 243)

Second. While it is true that there were seven witnesses to the shooting, any implication that these seven witneses testified that the shooting was not in self-defense is incorrect. One of those witnesses, whom the Solicitor General refers to as a "former girlfriend", did

not testify at all. A second witness, a minor child of the "former girlfriend", also did not testify. The only other adults present, Robert Logan and Minnie Jackson, both testified in the trial as defense witnesses and their testimony was consistent with Mr. Hughes' testimony that he acted in lawful self-defense. The other three witnesses--all minor children of the "former girlfriend"--did testify as witnesses for the prosecution. However, their testimony was open to question by the jury because of: (1) their ages; (2) their bias against Mr. Hughes because of past disagreements; and (3) the fact that the record indicates that one of them was being "signaled" from outside the courtroom while on the stand. See generally Mr. Hughes' District Court Memorandum, supra, at 4-13.

Third. It is true that the testimony before the jury indicated that Mr. Hughes had consumed some alcoholic beverages on the day in question. However, what the Solicitor General

fails to tell the Court is that the same testimony indicated that all of the adults present had been drinking and that the state's coroner testified that the deceased's blood-alcohol content was .14 milligrams--some 4 milligrams over the legal rate for driving while intoxicated. (H.T. 166-167)

Fourth. In claiming that the deceased attempted to shake hands with Mr. Hughes "as a gesture of friendship", the Solicitor General ignores the testimony of Robert Logan:

> "I'm telling the jury that the man walked toward Howard with his hand extended and what his intention was with the hand extended I couldn't say . . . ." (H.T. 240)

This account takes on added significance in light of Mr. Hughes' testimony, in another context, that the deceased was a larger man than he and that:

> "I couldn't let the man get a hold of me . . . ." (H.T. 264)

Equally as important, the initial recitation by the Solicitor General makes it sound as if Mr. Hughes shot the deceased when he had his hand extended. The second reference (Amicus Brief at 29, n. 31), states that the shooting occurred "immediately" thereafter. However, the record reveals that Mr. Hughes not only refused to allow the deceased to take hold of him, but that he attempted to break off all contact between them because he "turned his back and walked away." (H.T. 210; see also 218-219) It was only after that that Mr. Johnson initiated the actions which ultimately led to his death.

Fifth. The actions by the prosecutor, the trial judge, and the jury in the state trial court belie the claim made by the Solicitor General that self-defense was not properly in issue. The prosecutor did not object to the instruction upon self-defense. Rather, though he obviously did not want the jury to believe that the accused acted in self-defense, he seems

to have agreed that there was sufficient evidence to justify a self-defense instruction. (H.T. 288; J.A. 42). The trial court's indication that it would instruct upon self-defense was relatively cursory and seemed to indicate that there was no doubt in the Court's mind that such a charge was proper upon the facts before it. (H.T. 288; J.A. 42) If the charge was warranted when the defendant was erroneously required to "prove" self-defense, then it follows, a fortiori, that there was sufficient evidence to warrant the instruction when the defendant should only have had to "go forward" with evidence of self-defense.

Finally, the action of the jury--even though improperly instructed--has some bearing upon this question. If the evidence had indicated that this was the type of "cold-blooded" killing painted by the Solicitor General, then the jury would have returned a verdict of guilty upon the count of aggravated murder. The fact that the jury returned not

guilty verdicts upon both aggravated murder and murder indicates that the jury--having seen the witnesses and judged their credibility--rejected the interpretation placed upon the evidence by the Solicitor General.

Mr. Hughes submits that there can be no question but that self-defense was properly in issue. This being the case, this Court may properly consider the questions of whether the state violated Respondent Hughes' Fourteenth Amendment rights by requiring him to prove that he acted in lawful self-defense, and if so, whether the federal courts are powerless to correct an error of such magnitude.

ARGUMENT

In the interest of judicial economy and in order to avoid needless repetition, Respondent Hughes will limit his argument to those matters that are unique to his own case and, on issues of more general applicability, rely upon

the argument and legal analysis set forth in the Brief filed by Respondent Bell.

I.

The Effect of Trial Counsel's Objection to the Charge to the Jury

As set forth in the Statement of the Case, Respondent Hughes' trial counsel indicated that he was "going to object to the entire charge in its entirety . . ." (H.T. 350; J.A. 48-50) After a three-way discussion between the Court, the prosecutor, and trial counsel (H.T. 350-354; J.A. 48-50), the trial court made the following statement: "You may have your exception." (H.T. 354; J.A. 50)

These facts give rise to two possibilities. On the one hand, this Court may determine that the general objection to the "entire charge" constituted compliance with Ohio's contemporaneous objection rule--especially given the "exception" granted by the trial court and the trial court's failure to indicate that counsel

should be more specific in his objections. Obviously, if the Court adopted that view, then Mr. Hughes' trial counsel complied with the contemporaneous objection rule and there would be no occasion to consider the applicability of Wainwright v. Sykes, 433 U.S. 72 (1977).[7]

On the other hand, if this Court were to deem the objection insufficient, the fact that such an objection was made would nevertheless be relevant to the issues before the Court concerning the "adequacy" of the asserted independent state ground and the existence of "cause" under Wainwright. Trial counsel made it abundantly clear that the reason he was objecting to the "whole charge" was because the state had adopted "a new code in which many things are uncertain . . ." (H.T. 350; J.A. 48). As the court indicated in Holmes v. Israel, 453 F. Supp. 864 (E.D. Wisc. 1978), aff'd without published opinion, 618 F. 2d 111 (7th Cir. 1980):

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[7]Under the en banc decision in Isaac v. Engle, 646 F. 2d 1129 (6th Cir. 1980) (A. 1-22), Mr. Hughes was entitled to judgment in his favor without respect to whether the objection of his counsel was or was not judged sufficient to preserve the error. Consequently, it was unnecessary for the Circuit Court below to resolve that issue and there is nothing in their one-page opinion to indicate that they did so. (A. 60.)

> This indicates that one of the Wainwright court fears, 'sand bagging' by the defense counsel, . . . does not apply in this case because the making of the general objection and the motion for mistrial indicate that defense counsel was not engaged in 'sand bagging.'" Id. at 867.

Both the statement of the reason for making the objection, as well as the objection itself, indicate that there was no deliberate attempt to build reversible error into the record in this case. Further, the fact that this error was not raised on appeal and that the habeas corpus action was filed pro se, belies any claim that counsel made a strategic decision to "reserve" the error in hopes of obtaining a new trial by raising the issue in future proceedings. Under these circumstances, the state lacks the interest necessary to legitimize the enforcement of its contemporaneous objection rule. Further, even if such a rule were to be applied, these same factors would constitute "cause" within the meaning of Wainwright v. Sykes, supra.

II.

The Effect of the Actual Futility of Making an Objection Upon the Adequacy of an Asserted Independent State Ground and on "Cause"

It has long been established that the law will "not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980). This is a familiar doctrine in determining whether a state procedural rule constitutes an adequate and independent state ground to preclude the vindication of federally protected rights. E.g., Douglas v. Alabama, 380 U.S. 415, 422 (1965). See also Estelle v. Williams, 425 U.S. 501, 512, n. 8 (1976) (noting that an objection would not have been "fruitless").

Within the context of habeas corpus litigation, it is well established that in spite of the requirement to exhaust state remedies, 28 U.S.C. Section 2254(b) and (c), exhaustion does not require a "futile" act or an "idle or useless effort." E.g., Tatzel v. Hanlon, 530 F. 2d 1205, 1206 (5th Cir. 1976); Lewis v. New

Mexico, 423 F. 2d 1048, 1049 (10th Cir. 1970). The exhaustion doctrine, like the procedural default principle of Sykes, supra, is based on comity. Fay v. Noia, 372 U.S. 311, 418-420 (1963). Just as comity does not require vain acts under Section 2254(b) and (c), neither does it require vain acts under Sykes. The state has no valid state interest in the enforcement of a procedure that would be futile. Further, futility itself constitutes "cause" under Wainwright.

In Isaac v. Engle, 646 F. 2d 1122 (6th Cir. 1980), the panel decision authored by Senior Judge Peck concluded that "[t]o require an objection in these circumstances would be to require the doing of a vain act." Isaac, supra at 1126 (A. 30). Since this conclusion was based upon a consideration of state law by the Circuit Court, it may be entitled to preferential consideration. E.g., Rummel v. Estelle, 445 U.S. 263, 267, n. 7 (1980); Jenkins v. Anderson, 447 U.S. 231, 234, n. 1 (1980). This

could be particularly true in this instance since Judge Peck may have special insight into both the status of the state law question and the futility of the objection given his prior experience as an Ohio Common Pleas Judge and a Justice of the Ohio Supreme Court. See THE AMERICAN BENCH 37 (1979) (biography).

As developed fully in Respondent Bell's Brief, the conclusion of the Isaac panel is fully supported not only by logic and reason, but also by this Court's decision in O'Connor v. Ohio, 385 U.S. 92 (1966). See also State v. Cowans, 10 Ohio St. 2d 97, 104, 227 N.E. 2d 201, 207 (1967). The very same point was made by the Ohio Court of Appeals in State of Ohio v. Newell Junior Hamilton, No. 5088 (2nd Dist. Ohio Ct. App., Mont. Cty., December 9, 1976) at 3:

> "Here, an objection to the instruction on self defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added.) (Copy reproduced in Respondents' Addendum.)

As strong as this conclusion is on general principles, there are specific facts which are even more compelling to Mr. Hughes' case. Under Ohio law a decision of a state Court of Appeals is binding upon all the trial courts within its district. E.g., In re Schott, 16 Ohio App. 2d 72, 75, 241 N.E. 2d 773, 776 (1968). Greenwood v. City of Portsmouth, 29 Ohio Misc. 161, 164-165, 281 N.E. 2d 45, 47 (Common Pleas, 1971).

Respondent Hughes was indicted and tried in Summit County, Ohio. Summit County is one of four counties in the Ninth Judicial District of the Ohio Court of Appeals. Mr. Hughes' trial commenced on January 21, 1975. (H.T. 6) Closing arguments were given on January 24 (H.T. 291) and the jury was instructed on that same day. (H.T. 330) Two days prior to the date on which the jury instructions were given, the Ninth District Court of Appeals issued its opinion in State of Ohio v. Robert L. Ladany, No. 7534 (9th

Dist. Ohio Ct. App., Summit Cty., January 22, 1975). After quoting and construing R.C. 2901.05, that Court held:

> ". . . we believe there is no change from the time honored rule that intoxication . . . when claimed by a defendant . . . must be established by a preponderance of the evidence." Ladany, supra at 9. (Copy reproduced in Respondents' Addendum at 66, 74.)

Based upon Ladany, the trial court--even had it interpreted R.C. 2901.05 in the same manner as it was subsequently viewed in State v. Robinson, 47 Ohio St. 2d 103, 251 N.E. 2d 58 (1976)--would still have been bound to instruct the jury that the accused bore the burden of proof on self-defense.

Indeed, the actual futility of raising the objection to the jury instructions here is forcefully demonstrated by that same Court's decision nine months later in State of Ohio v. Robert Earl Morrow, No. 7757 (9th Dist. Ohio Ct. App., Summit Cty., October 22, 1975). The third assignment alleged that error was committed:

"' * * * in instructing the jury that the defendant-appellant must prove his defense of self-defense by a preponderance of evidence.'" Id. at 3.

The Court's entire disposition of that error read as follows:

"From the time when the memory of man runneth not to the contrary, the rule in Ohio has been:

'On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence.'

Silvus v. State, 22 Ohio St. 90, Ezell v. State, 119 Ohio St. 39; Section 2901.05 R.C.

We reject assignment of error three." Id. at 4.

Consequently, Respondent Hughes maintains that any attempt to raise an objection on the jury instruction in question would have been futile in fact. The trial court not only would have disagreed with counsel but would have actually lacked the power to give a proper instruction because of the precedent binding

upon it. Under these circumstances, the state's interest in enforcing the contemporaneous objection rule is not sufficient to sustain it as an "adequate" state ground for barring review. Further, the actual futility would, itself, constitute "cause" under Wainwright.

III.

Prejudice and the Relationship between Self-defense and Manslaughter

The erroneous jury instruction in the case at bar shifted the burden of proof from the State and placed that burden upon the accused upon the issue of self-defense--the major factual question disputed before the jury. An error in the burden of proof in a criminal trial "substantially impairs" the "truth-finding function" and therefore "raises serious questions about the accuracy of the guilty verdicts in the past trials . . ." Hankerson v. North Carolina, 432 U.S. 233, 243 (1977) quoting and adding emphasis to Ivan V. v. City of New York, 407

U.S. 203, 204 (1972). See also Sandstrom v. Montana, 442 U.S. 510, 523-524 (1979). Consequently, such an error is per se prejudicial. Isaac v. Engle, supra at 1129 (panel decision, Judge Celebrezze, concurring); Isaac v. Engle, supra at 1134 (plurality en banc decision).

In the case of Respondent Hughes, the prejudice is particularly acute because of the fact that even with the erroneous jury instruction, the jury in his case nevertheless acquitted him of both aggravated murder and murder. It is true that the same jury also convicted him of voluntary manslaughter. But that fact, rather than mitigating the error, highlights the degree of prejudice. In Ohio, as in most states, there is great similarity between the facts that the jury must find to be true in order to reduce the crime of murder to

voluntary manslaughter and facts that would support a reasonable doubt as to whether or not the accused acted in lawful self-defense.[8]

Indeed, logical and common sense will bear out the fact that the "provocation" of

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[8]With respect to voluntary manslaughter, Section 2903.03(a) of the Ohio Revised Code provides:

> "No person, while under extreme emotional stress brought by serious provocation reasonably sufficient to incite him into using deadly force, should knowingly cause the death of another."

While there is no statutory definition of self-defense in the State of Ohio, the Ohio Supreme Court has indicated that there are three "elements" to self-defense:

> a. "The slayer was not at fault in creating the situation giving rise to the affray . . . ;
>
> b. "The slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; . . . and
>
> c. "The slayer must not have violated any duty to retreat or avoid the danger . . . " (Citations omitted.)

State v. Melchior, 56 Ohio St. 2d 15, 20-21, 381 N.E. 2d 195, 199 (1978).

manslaughter and the "justification" of self-defense are different ends of the same continuum. In a given fact situation, it is entirely conceivable that while a defendant may have actually been in serious fear of great bodily harm or death, the jury may nevertheless determine that such fear was not reasonable and hence find that he is not justified in acting in self-defense. The same jury may nevertheless find that the actions of the deceased constituted sufficient "provocation" to justify returning a verdict of guilty of voluntary manslaughter. Alternatively, one can imagine situations where the jury, if it credited the entire testimony of the accused, would return a verdict of not guilty based upon self-defense. Yet, a jury might reasonably credit some but not other portions of a defendant's testimony and therefore return a guilty verdict of voluntary manslaughter. It is because of circumstances such as these that the provocation necessary for voluntary manslaughter has often been referred

to as "imperfect" self-defense. See generally LaFave and Scott, Section 77, pp. 583-584 (1972) and I Warren on Homicide Section 151 (1914). This point is borne out by the case of State v. Vancak, 90 Ohio St. 211, 107 N.E. 511 (1914). There, the Ohio Supreme Court discussed the relationship between manslaughter and self-defense:

> "If the blow was struck in self-defense, then the act was lawful, and the accused innocent of any crime. If the blow was not struck in self-defense, then the act was unlawful, and, death having ensued, the accused was guilty of manslaughter, unless the elements of murder in the first degree or murder in the second degree were present . . . ." 90 Ohio St. 214-215, 107 N.E. at 512.

Further, the Court indicates that since the jury found the defendant not guilty of murder in the first degree or in the second degree:

> ". . . it follows that if he fails to sustain his plea of self-defense by a preponderance of the evidence, he was guilty of manslaughter . . . ." Id.

Consequently, Respondent Hughes maintains that as great as the prejudice was in the cases of Respondents Bell and Isaac, it was even more evident in his own case. It was entirely possible that the jury found there was at least a reasonable doubt as to whether he was acting in self-defense, but failed to acquit him solely because of the view that he failed to prove self-defense by a preponderance of the evidence. This being the case, the same evidence which raised a reasonable doubt upon guilt or innocence on the self-defense issue could well have been used by the jury to reduce the alleged crime from murder to voluntary manslaughter.

CONCLUSION

The general principles which call for the affirmance of the decision of the Circuit Court below in Respondent Bell's and Respondent Isaac's cases also support a judgment in favor of Mr. Hughes. While the close relationship between self-defense and the provocation aspect of manslaughter injects a heightened visability to the prejudice in Mr. Hughes' case, it cannot be doubted that jury instructions shifting the burden of proof prejudiced each of the Respondents. Moreover, the particular facts of Mr. Hughes' case--the objection made by his counsel at trial and the demonstration of the actual futility in the making of such an objection--illustrate both the inadequacy of the state's interest in the enforcement of Ohio Criminal Rule 30 and the existence of "cause"

for all three Respondents. Accordingly, Respondent Hughes submits that the judgment of the Sixth Circuit United States Court of Appeals should be affirmed.

Respectfully submitted,

RICHARD L. AYNES
Counsel of Record

J. DEAN CARRO

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325
(216) 375-7751

Counsel for Respondent
Hughes

CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief were sent by first-class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and Richard David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, 43215, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this ___ day of August, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

RICHARD L. AYNES
Counsel for Respondent

CASE NO. 80-1430

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TED ENGLE, Superintendent,
Chilicothe Correctional Institute,
Petitioner,

v.

LINCOLN ISAAC,
Respondent.

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,

v.

KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent
Chilicothe Correctional Institute,
Petitioner,

v.

HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioners

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OPINIONS BELOW

The panel decision of the United States Court Of Appeals For The Sixth Circuit in **Isaac v. Engle** is now reported at 646 F. 2d 1122 (6th Cir. 1980). The en banc decision in **Issac** is now reported at 646 F. 2d 1129 (6th Cir. 1980).

STATEMENT OF THE CASE

For present purposes the only additional statement of the case necessary is a clarification of the facts concerning the actual crimes presented in Hughes and Isaac's answer briefs on the merits. Unlike other courts which have dealt with similar burden shifting issues the appellate court below "presumed" prejudice and made no reference to the actual facts of the crime beyond the fact that self defense was in issue. See: **Myers v. State of Washington**, 646 F. 2d 355 (9th Cir. 1981). Having attempted to bolster this ruling of law which is challenged in these cases, it is at least incumbent that a balanced and accurate presentation be made.

An example is Hughes' assertion that the only other adults present testified as defense witnesses consistent with Hughes' testimony that he had acted in self defense. Hughes' brief, page 7. Minnie Jackson, one of the two adults referred to testified that prior to the shooting the victim was standing over by a coffee table talking to Marie Hubbard preparing to leave, that his hands were down at his sides, and that he was not moving toward Hughes. (Hughes Tr. 216-219). In addition, she testified that she did not see the second shot as she was running to the basement and kept on going. (Hughes Tr. 211). Roger Logan's (Bootsie) testimony was even more inconsistent with Hughes. Logan testified as follows:

Q. Okay. There came a point, I believe, when Lemuel Johnson stood up from this davenport (indicating) is that correct?

A. Yes. He got up and went to the door.

Q. All right. Then what's the next thing you saw and observed?

A. Well, after he stood there and listened to Marie and Howard bickering among themselves, he stood up and said, "Well, I ain't got but one thing to say," and started walking towards Howard.

Q. Then what happened?

A. Well, he extended one of his hands toward Howard, and Howard told him that he didn't – he wasn't going to shake like that, and backed away from him.

Q. Okay. Then what Happened?

A. Then when he took a couple more steps Howard pulled the gun and shot him.

Q. Did you hear Howard give any warnings to back off, keep away?

A. No. Howard didn't say anything to him.

Q. All right.

A. He just said he didn't shake that way.

Q. How many shots were there?

A. I heard two.

Q. And when the second shot was fired was Lemuel backing up or going forward towards Howard?

A. Well, when the first shot hit him I think he was fixing to fall.

Q. All right. And did he continue forward or did he back up?

A. He was falling away.

Q. All right. Now, would you describe for this Court and Jury how the shots were fired? In other words, was it a bang - - bang, or was it a bang - bang?

A. Well, the first shot was fired off and a second or two and the other one was fired.

(Hughes Tr. 230-232). In addition, Logan testified that he never saw the victim's hands in his pockets and that when he extended his hand it was open. (Hughes Tr. 233-238, 240). In fact, Logan so contradicted Hughes' version of events that defense counsel requested he be declared a hostile witness:

> Your honor, I'm declaring this man a hostile witness. He's testifying for the State.

(Hughes Tr. 235).

Hughes points out that petitioners have never contested that self defense was properly in issue. Having shot the victim in front of witnesses, that was the only defense Hughes had. But no witness backed up Hughes' version of the events and as demonstrated above his "Defense" witnesses were equally as helpful, if not more so, to the State. Upon consideration of the entire record and not just Hughes' testimony the state appellate court stated:

> Our examination of the testimony of the witnesses in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand.

(JA 53).

Isaac's version of the facts in his case is even more misleading. The statement is made in Isaac's brief, page 1, that:

> "Isaac claimed Engle, without provocation, sucker punched him first from behind and he acted in self defense. . . . The only witnesses to the first punch were Isaac and Engle. Mrs. Schob admitted upon cross examination, that she did not see the beginning of the fight."

The entire statement is erroneous. Engle claimed that Isaac sucker punched him from behind not the reverse. Isaac's testimony at trial was that he decided to go see him ex-wife at the bar where she worked, that "she cussed me out" and told him to leave. At that time Engle drove up, called him over, told him to leave his ex-wife alone, and took a swing at him which grazed

his right shoulder. At that time, Isaac hit him "three or four hard licks" with his bare fists knocking him to the ground. When he got back up, Isaac hit him "another two or three licks" and knocked him down again, at which time he didn't get up again. Isaac then left the scene. (Isaac Tr. 128-131). In an earlier statement to police, Isaac stated a similar version except that the first punch missed and did not graze him.

A similar misstatement is made with respect to the testimony of Isaac's ex-wife, Donna Schob. Schob testified as follows:

> A. . . .Mr. Engle pulled up right in front of his car and he got out. Mr. Engle got out and Mr. Isaac was already standing beside his car and so the next thing, I saw Mr. Isaac throw a punch at him. I knew something - he was trying to do something. I immediately came back in and called the police.
>
> Q. You saw Mr. Isaac throw a punch at Mr. Engle?
>
> A. At Mr. Engle.
>
> Q. And you saw Mr. Engle from the time he pulled up until the time he was struck?
>
> A. I saw him get out of his car. He pulled up in front of Mr. Isaac's car and got out of his car. In other words, you might say they were standing face to face.
>
> Q. . . . .

A. . . . .

Q. Were you able to observe them during this time?

A. Just as I said, I saw him throw the first punch, then I immediately ran back in and called the police.

Q. Did you at any time see Mr. Engle say or do anything prior to the time Mr. Isaac hit Mr. Engle?

A. No.

Q. Did he raise either of his hands or fists?

A. I did not see that.

(Isaac Tr. 21-22). Upon cross examination, defense counsel asked her a series of questions, some inaccurately premised as to time and place as to what she had seen from the window on the side of the building as opposed to the window in the door of the bar. Such questions resulted in the statement relied upon by Isaac that she admitted she did not see the first blow. Redirect examination however disclosed that such statement was not the testimony of Schob. (Isaac Tr. 51). Schob repeatedly testified on redirect and recross that she saw the incident entirely from the time Engle got out of his car until the first blow was struck. (Isaac Tr. 52-61, 65-66).

The record, of course, contains many conflicting versions of what occurred including whether Engle warned Isaac not to see his ex-wife or Isaac warned his ex-wife not to see Engle. Even taking Isaac's version at face value however the jury could rightfully have rejected self defense. According to Isaac's own testimony, he

knocked Engle to the ground twice by as many as seven "hard licks" in response to a grazing swing at his shoulder. The ultimate impact of whether this was self defense was evident to the jury from the nature of Engle's injuries - including a broken jaw, facial lacerations, and a mechanical brace to hold his face together.

REPLY ARGUMENT ON THE MERITS

A. FUTILITY OF OBJECTION

Petitioners have asserted that the Court of Appeals' analysis in these cases makes **Wainwright v. Sykes**, 433 U.S. 72 (1977), a nullity by removing any middle ground between ineffectiveness of counsel and cause in which counsel's actions will be binding upon his client. The answer briefs of respondents demonstrate that petitioners' perception is accurate.

The clearest statement of the dispute between the parties is evidenced by Isaac's brief at page 6:

> The duty of trial counsel is not to make new law, but to diligently find existing law and provide it to the court so it has the opportunity to correctly charge the jury as to the law to be applied in the case.

The response of Judge Poole, dissenting in **Meyers v. State of Washington**, *supra* at 363, 364 is answer enough:

> . . .it should be remembered that the boundaries of constitutional rights have historically been redefined, patient mete and meter, largely by the efforts of diligent and thoughtful attorneys who search for and raise "new", but logical

> and reasonable extensions of previously established, or at least suggested, doctrines. This is important to the values we place on competence in advocacy in the larger aim for fair trial. The majority, it seems to me, ignores or denigrates these fundamental aspects of our legal system by the suggestion that it is unreasonable to expect the defense to raise objections at trial that are thoughtful and creative, rather than mere rote recitations of horn-book legal principles. The majority also takes too limited a view of the comity interests involved in this situation. Unless the objection was truly so far ahead of its time that its conception would have been visionary, I think that the state trial court is entitled to an opportunity to consider it before it may provide the basis for reversal on habeas corpus. Foresight of this level does not, as the majority seems to fear, accrue only to legal prophesy; it hallmarks also the able defender.

While Isaac cites **State v. Williams**, 51 Ohio St. 2d 112 (1977) for the proposition that Ohio Cr. R. 30 presupposes the existence of an established ground for objection the holding of the case and the reference therein to the "true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error" establishes that Ohio Cr. R. 30 does not have the limited purpose ascribed to it by respondents.

Respondents have attempted to isolate two separate and independent components of futility - the lack of perception of the issue itself and secondly, if perceived, the lack of probable success of such issue if raised. What

respondents have not shown however is how such indicia are any different than any other indicia which determine whether to raise an issue. The failure to determine whether an issue exists or that if it exists, it will be successful are no less strategic than any other decision counsel is entrusted to make.

The present cases serve as prime examples. Isaac asserts that his counsel after diligently researching the issue concluded that no change in the law had occurred. That however underscores that the determination was strategic. While offering an explanation that such decision was reasonable in light of prior law, it does nothing to further the analysis that such explanation is justification as well.

The question of burden shifting is not new - the concept is of long standing origin. At the time of respondents' trials, the doctrine had been applied in many other state courts systems and in the federal system itself to self defense claims and other affirmative defenses. Moreover, a new statute was in effect, and this court's recent decision in **Mullaney v. Wilbur**, 421 U.S. 684 (1974) had been decided. To say that the issue was "visionary" as opposed to difficult is simply incorrect. Respondents have asserted on the merits that the **State v. Robinson**, 47 Ohio St. 2d 103 (1976) error was so fundamental as to deny them a fair trial. But if it is now perceived that the error was so fundamental, it could have been perceived prior to trial. As this Court noted in **Wainwright**, if a defendant believes that an action of a trial court is about to deprive him of a constitutional right, it is incumbent on that defendant to raise it.

Similarly, the argument that if the issue had been raised at trial or on appeal, it would not have been successful is strategic explanation, not justification. Bell and Hughes demonstrate this point well. Bell asserts at page 53 of his brief in support of an argument for

objective practical futility that four Ohio Appellate Courts had decided the issue adversely to the later decision in **Robinson,** *supra* and at page 52 that there are seven documented cases in which an objection was overruled. Hughes goes even further and at pages 18-20 of his brief argues "actual" futility by intermediate appellate decisions controlling his case. Aside from showing however that the issue was being raised by other counsel (despite earlier assertions that it was impossible to conceive the issue) it underscores the fact that ultimate success is not always achieved at the trial court level or even initial appeals. Whether the issue is deemed important enough to pursue to completion in the face of adverse authority is part of the strategic calculus.

An example is **Hawk v. Berkemer,** 610 F.2d 445 (6th Cir. 1979). There the State of Ohio successfully challenged two prior adverse Sixth Circuit precedents on exactly the same point. Had that Court not been persuaded to change its earlier views, certiorari would certainly have been available to further contest the issue. The Court may of course, take judicial notice of decisions in which the Court ultimately reversed a prior precedent. Moreover, assuming that Hughes and Bell had researched the issue and were actually aware of the unreported decisions that they now rely on as having deterred raising the issue, it is then possible that they might also have become aware of the appellate court opinion in **State v. Robinson,** 48 Ohio App. 2d 197 (CA Franklin 1975) and the earlier December 24, 1974 opinion in **State v. Mathews,** No. 74 AP 428. See 48 Ohio App. 2d *supra* at 200. At that time, Bell and Hughes could have requested certification of the issue to the Ohio Supreme Court based upon conflict in appellate decisions.

It is of course impossible to know at this time whether Bell and Hughes were actually aware of these unreported decisions at the time of their trial and were thus "deterred". Neither made an objection at trial and

neither raised the issue on appeal. While acknowledging that the objection he made seemed to go to different issues Hughes does argue his counsel made an objection to the "entire charge". Whether Ohio would have recognized such a non-specific objection however is impossible to say as the "issue" was not pursued on appeal. **United States v. LeBlanc**, 612 F. 2d 1012 (6th Cir. 1980). Moreover, even if the objection were not specific enough, Hughes then argues that the failure to make a specific objection shows a lack of deliberate "sandbagging". But the term, as used in **Wainwright**, *supra* does not necessarily imply gamemanship. **Washington v. Estelle**, 648 F. 2d 276 (5th Cir. 1981). Hughes certainly wishes now to take advantage of an issue he neither raised nor helped decide.

A central theme to the argument on futility is that the State has no legitimate interest in preventing resolution of these cases if the objection was not easily made. But finality in the law is an interest which is both viable and necessary. **Federated Dept. Stores, Inc. v. Moitie**, _____U.S._____101 S. Ct. 2424 (1981). If the objection had been made, the trial court may have perceived the issue. If the issue had been raised on appeal, the appellate court like **Robinson** might have reversed. If the issue had been prosecuted to the Ohio Supreme Court, the pertinent case may have been, not **Robinson**, but Bell, Hughes, or Isaac. While Bell appears to argue that instructions are somehow different than other issues at trial, they, no less than other issues, serve to focus the efforts of the parties upon the main event in the criminal law process - the trial.

That no middle ground exists under respondents' theory is seen from the alternative argument that their failure to raise the issue is ineffectiveness of counsel. Respondents assert that if their counsel had a duty to anticipate the issue, then the failure to so anticipate is ineffectiveness, per se. Such a view requires the criminal justice system to insure that all counsel are equal. A

defendant is entitled to competent counsel - not perfect counsel. The issue before the court is whether competent counsel can bind their client to less than perfection.

B. RETROACTIVITY AND EQUAL PROTECTION

The amicus brief of the Institutional Legal Services Project (State of Washington) seeks to assert that the State's interest in finality is subsumed in the determination of retroactivity. Even accepting that formulation of the problem however, no additional benefit is conferred on respondents. Ohio, in determining the retroactivity of its state created decision, balanced the interests such that the decision in **Robinson** was retroactive to those who objected. Unless equal protection is implicated, the amicus argument fails in its initial premise. In terms of equal protection, what Ohio did was clearly premised on the guidance by this Court in **Hankerson v. North Carolina,** 432 U.S. 233 (1977).

A separate equal protection argument is raised by Isaac. Isaac asserts that Ohio Cr. R. 30 denies equal protection in that it applies only to jury trials. **State v. Humphries,** 51 Ohio St. 2d 95 (1977). The issue was never raised in any court below. Moreover, there is nothing irrational about drawing a distinction between a self instructed trier of fact who is presumed to know the law and a jury which must be instructed as to controlling principles.

A final equal protection argument is raised by Bell. At pages 46-49, Bell argues based on unreported state cases decided prior to **State v. Long,** 53 Ohio St. 2d 91 (1978) that the determination of whether **Robinson** is plain error has been decided by the Ohio Courts in an arbitrary and capricious manner. Equal protection how-

ever does not guarantee uniformity of judicial decisions. **Beck v. Washington,** 368 U.S. 651 (1962). This is especially true in the absence of an authoritative construction by the State's highest court. Moreover, it should be noted that **State v. Long,** *supra* did not foreclose that plain error might be shown. Rather, it simply held that plain error is not established simply by citation to **Robinson.**

C. PLAIN ERROR – ADEQUATE STATE GROUNDS

A third argument common to respondents is that **Wainwright** should not apply to "plain error". Although not relied on by the Appellate Court below, this was the initial response of such court to waiver questions. **Berrier v. Egeler,** 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955. The argument proposes that because a state has a plain error review mechanism of its own that it has waived any legitimate interest that it has to enforcement of its contemporaneous objection rule. Such an approach creates the novel proposition that in order to invoke the interests of its contemporareous objection rule, the State would have to eliminate its plain error review muchanism. This is hardly likely to make the state courts more receptive to being a co-equal court with the federal courts in responding to claims of constitutional deprivation. Having recognized the validity of contemporaneous objection rules in **Wainwright,** it would appear anomalous that such rules are so fragile. In **Hockenbury v. Sowders,** 620 F. 2d 111, 114 (6th Cir. 1980), Judge Kennedy, writing for the Court stated:

> **Wainwright** makes it clear that the role of the federal courts in preventing manifest injustice in these cases is maintained through the application of the "cause"

> and "prejudice" exception to the finality of state procedural rules, rather than an independent application of those rules.

See also: **Wainwright,** *supra,* at 90-91.[1] The notion of "independent" plain error gives no deference to comity or the state's interest in finality. *See;* **Ratcliff v. Estelle,** 597 F. 2d 474 (4th Cir. 1979).

To be sure, the Court might find an asserted independent state ground to be inadequate. **Henry v. Mississippi,** 379 U.S. 443 (1965). But if an independent state ground is found to be adequate, it should not be subject to a non-definable plain error rule above and beyond "cause and prejudice". Moreover, the contemporaneous objection rule involved herein meets the traditional tests of an adequate state ground. **Wainwright,** *supra.* While amicus, the Ohio Criminal Defense Lawyers Association asserts use of the contemporaneous objection rule is a device to avoid consideration of a federal right, that merely states the obvious with respect to all preclusive procedural devices. Balancing the interests of the State in the finality of their criminal convictions - in these cases - mostly homicides, Ohio has not created an impermissible artifice to defendants seeking the benefits of the state created **Robinson** decision.

D. WAIVER OF WAIVER

Bell asserts two arguments, not raised previously in opposition to certiorari being granted, that petitioners have waived the waiver argument in his case. Aside from the fact that neither argument is applicable to Isaac,

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1. Despite the above resolution, it appears that at least some members of the appellate court below still adhere to a contrary view. *See:* **Hockenbury v. Sowders,** 633 F. 2d 443 (6th Cir. 1980); **Murray v. Superintendent,** 651 F. 2d 541 (6th Cir. 1981).

Hughes or the numerous other decisions pending in the federal courts in Ohio awaiting resolution of these cases, neither argument has merit.

The first argument is that petitioners did not raise the waiver issue with respect to Bell's case in the district court. Whatever the merit to this contention, it is clear that it was not the basis for decision by the appellate court in **Bell v. Perini**, 635 F. 2d 575 (6th Cir. 1980). Instead, that Court ruled:

> We believe that Bell, in the instant case, has likewise shown "cause" and "prejudice" as is required by **Wainwright** for the reasons stated in the plurality opinion in **Isaac.**

Supra at 578. Moreover Judge Merritt specifically dissented on the basis that Ohio's contemporaneous objection rule provided an independent state ground. Having actually ruled on the waiver question, the decision of the Court of Appeals is ripe for review. **City of Newport v. Fact Concerts, Inc.**, _____U.S._____, 101 S. Ct. 2748 (1981).

The second objection, never raised in any court below is that the failure of the State to submit the transcript of Bell's trial to the district court eliminates any factual predicate from the record that Bell did not object. What respondent does not assert however is that Bell did in fact object. If Bell is now contesting his prior acquiescence in the statement that Bell did not object, it is an assertion which can be readily verified.

E. STATE LAW ERROR – CONSTITUTIONAL ERROR

The clearest dispute between the parties on the merits is evidenced by Bell's brief. At page 4, Bell states:

> . . .United States Court of Appeals for the Sixth Circuit determined that it was error to place the burden of proof upon the accused to prove that they had acted in self defense. Petitioners do not deny that such an error occurred.

Petitioners do not deny that an error occurred pursuant to the state created decision in **State v. Robinson,** *supra.* Petitioners do deny and vehemently contest that an error of consitutional law occurred. This case is simply not **Mullaney v. Wilbur,** *supra.* In **Mullaney,** the state law as applied was found to unconstitutionally shift the burden of proof. In these cases, the State Courts, by misapplying state law which had yet to be construed, gave the lesser of two equally constitutional instructions. It is in apparent recognition of this destinction that Bell attempts to persuade the Court that the instruction actually given is itself unconstitutional.

Bell's argument on this point has two major components. The first is that it is inherently and fundamentally unfair to place the burden of proof of the confession and avoidance doctrine of self defense on the defendant. To this extent, Bell's argument implicates the inherent power of a State to define the essential elements of the crime. **Patterson v. New York,** 432 U.S. 197 (1977). However, the Sixth Circuit's precedents are of no aid to Bell on this point. In **Carter v. Jago,** 637 F. 2d 449 (6th Cir. 1980), (petition for rehearing en banc pending) the Court rejected the contention that is beyond the power of a legislature to determine that the person in the best position to know the facts of the

defense could be required to carry a "preponderance" burden as to it. See also: **McElroy v. Holloway,** _____ U.S._____, 69 L. Ed. 2d 398 (1981), Rehnquist, J. and Burger, C.J., dissenting. It may be that the doctrine of self defense springs from constitutional bases itself. But making the determination that a state must provide a defense of self defense says nothing as to how it must be defined or who has the burden with respect to it.

The second argument is that self defense negates other unspoken elements of crimes in Ohio, thus requiring the State to disprove the existence of the defense. In reality, however, this argument posits that there never have been, are not, and could not be any affirmative defenses in Ohio. This is particularly novel in light of the holding in **Robinson** itself that self defense was not in issue unless the defendant raised it.

The central premise of this argument is that since self defense results in a finding of "not guilty" it must contradict an element. As suggested "elements", Bell proposes the "requirement of criminal conduct", the "requirement of criminal intent", the "requirement of a voluntary act", the "allegation of unlawfulness" and the "allegation of against the peace and dignity of the State". The failure of Bell to even cite to **State v. Poole,** 33 Ohio St. 2d 18 (1973) establishes that the argument is not founded on the authoritative construction of Ohio law on affirmative defenses. Therein, the Ohio Supreme Court stated at page 19:

> This Court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, *provable for the most part under the plea of not guilty,* which are referred to as "affirmative defenses".

(emphasis added). Under **Poole**, Ohio could require a jury to state its verdict as not guilty or "not punishable by reason of self defense". That Ohio has chosen a different form does not control the substance of what occurs.

A comparison of Bell's argument to the historically recognized affirmative defense of insanity establishes that Bell is arguing for elimination of all affirmative defenses. While insanity is called a defense of excuse and self defense, a defense of justification, each is premised on the notion that a person who has done an act with the requisite intent required by law should not be punished. Under Bell's theory, insanity would also violate "criminal conduct", "criminal intent", "voluntary act", "unlawfulness", and "peace and dignity". A more accurate statement of Ohio law is that otherwise criminal conduct is not punished.

Bell's third argument is that relied on by the appellate court below - once Ohio enacted O.R.C. section 2901.05 it created "absence of self defense" as a functional element of the crime rather than merely altering the quantum of proof required for an affirmative defense. While Bell appears to rely on unreported state appellate decisions, petitioners would prefer the authoritative constructions of Ohio law of the Ohio Supreme Court. Bell dismisses the impact of **State v. Abner**, 55 Ohio St. 2d 251 (1978) and the refusal of the Court therein to require a specific instruction on the duty of the State to disprove self defense by making the bald statement that since absence of self defense is an element under **Robinson**, that **Abner**, is probably unconstitutional as well. Bell, brief page 18. Moreover if there was ever any doubt that self defense remained an affirmative defense after **Robinson**, **State v. Jones**, 67 Ohio St. 2d 244, 249 n. 1 (1981) settles that question:

> This Court has held that the defenses of insanity, intoxication, and self defense are affirmative defenses. **State v. Robinson,** (1976), 47 Ohio St. 2d 103, 108.

Petitioners' principal problem with the analysis utilized by the appellate court is that it draws no distinction between what errors of state law are matters of state concern and what are federal constitutional questions. The premise appears to be that **Robinson** created a protected interest which it is somehow the federal courts duty to enforce. But if **Robinson** was itself not constitutionally required, how does the appellate court distinquish between the interest created by any other state statute, evidentiary principle, or rule of procedure. Under the appellate court analysis every question of error of state law becomes a federal habeas corpus concern. While not previously articulated in this fashion, this Court has consistently held that the process which is due for errors of state law is appellate review in the state courts. **Wainwright v. Stone,** 414 U.S. 21 (1973). Unless federal habeas corpus courts are to be super appellate courts for the states, such distinction must be renewed.

CONCLUSION

The decisions of the Courts below are erroneous as to both the "cause" and "prejudice" components of **Wainwright v. Sykes,** *supra.* As such, a reversal in each case is required.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record for Petitioners

RICHARD DAVID DRAKE
Assistant Attorneys General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Petitioners has been served on respondents by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main St., Circleville, Ohio 43113, counsel for Isaac; and Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell and Hughes, by U.S. Mail, postage paid, this _____ day of September, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 44113; Kenneth Bell, No. 141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
Counsel of Record

MOTION FILED
AUG 7 1981

CASE NO. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

TED ENGLE, Petitioner

v.

LINCOLN ISAAC, Respondent

E.P. PERINI, Petitioner

v.

KENNETH L. BELL, Respondent

TED ENGLE, Petitioner

v.

HOWARD HUGHES, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SUPPORTING RESPONDENTS

JOHN B. MIDGLEY
Attorney
Institutional Legal Services Project
1702 Smith Tower
Seattle, WA 98104
(206) 464-5921

ATTORNEY FOR AMICUS CURIAE

ABCD AT CRAFTSMAN PRESS, SEATTLE

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MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The undersigned hereby requests leave to appear as amicus curiae supporting Respondents on behalf of Institutional Legal Services Project of Seattle, Washington. Institutional Legal Services Project is publicly funded and represents, on civil and post-conviction matters, persons in state custody in the State of Washington. The Ninth Circuit Court of Appeals has recently ruled on habeas corpus issues related to this case in the case of a Washington prisoner; the continued vitality of that ruling may be affected by the outcome of this case. Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). Institutional Legal Services represents another Washington prisoner whose case, raising issues closely related to those in Myers, was argued in the Ninth Circuit on July 8, 1981; at that argument, the question of the pos-

sible impact of this Court's decision in the present cases was raised. Gibson v. Spalding, Ninth Circuit No. 80-3522. Other clients of this office will likely be affected by the outcome of the present cases in this Court.

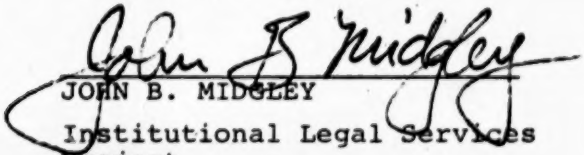
The brief included with this motion addresses issues which, to this writer's knowledge, are not being directly addressed by the parties. Specifically, the question is raised whether the holding of Wainwright v. Sykes, 433 U.S. 72 (1977) applies to the types of federal constitutional issues raised in the cases at bar. Argument is presented that, with respect to the federal habeas corpus petitions involved in these cases, which request relief under new constitutional decisions applied with full retroactive effect to the habeas petitioners' trials, Wainwright does not provide the standard

for determining whether the claims should be heard on the merits in federal habeas proceedings. It is respectfully submitted that this amicus curiae brief presents arguments which this Court should consider in deciding these cases.

The undersigned has, as required by Supreme Court Rule 36.2, sought consent for appearance as amicus curiae from all parties. Written consent was received from counsel for Respondents Bell and Hughes. See Appendix to Brief of Amicus Curiae. The undersigned wrote to Mr. Kingsley, counsel for Respondent Isaac, requesting consent. Mr. Kingsley has not responded, and the undersigned has been unable to reach him by telephone. Counsel of record for petitioners refused consent on the basis set forth in his letter of July 27, 1981. See Appendix to Brief of Amicus Curiae. It is submitted that there

has been no substantial reason advanced by any party why the present motion should not be granted.

Respectfully submitted this
5th day of August, 1981



JOHN B. MIDGLEY
Institutional Legal Services Project
1702 Smith Tower
Seattle, WA 98104

(206) 464-5921

ATTORNEY FOR AMICUS CURIAE

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BRIEF OF AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICUS CURIAE

Institutional Legal Services Project is publicly funded and represents, on civil and post-conviction matters, persons in state custody in the State of Washington. The Ninth Circuit Court of Appeals has recently ruled on habeas corpus issues related to this case in the case of a Washington prisoner; the continued vitality of that ruling may be affected by the outcome of this case. Myers v. Washington, 646 F.2d 355 (9th Cir. 1981). Institutional Legal Services represents another Washington prisoner whose case, raising issues closely related to those in Myers, was argued in the Ninth Circuit on July 8, 1981; at that argument, the question of the possible impact of this Court's decision in the present cases was raised. Gibson v. Spalding, Ninth Circuit No. 80-3522.

Other clients of this office will likely be affected by the outcome of the present cases in this Court.

SUMMARY OF ARGUMENT

Wainwright v. Sykes, 433 U.S. 72 (1977) does not govern the question whether the habeas corpus petitions in the present cases should have been heard on the merits. Since, as is assumed herein, the present cases involve the application of new constitutional rules to trials which were held before the new rules were promulgated, and since such rules are fully retroactive to those trials, Wainwright does not apply. Therefore, the petitions in these cases were correctly heard on the merits by the Sixth Circuit.

The constitutional analysis used by this Court to determine the retroactivity of new decisions takes into account the states' interests in the integrity of

their criminal justice systems. Relatively few basic new constitutional decisions are held to be fully retroactive. When full retroactivity is extended, convicted persons may raise claims under the new rule in habeas corpus proceedings.

Wainwright v. Sykes, supra, does not apply to determinations of the availability of habeas corpus relief in these circumstances for several reasons. Wainwright dealt with the failure to raise before trial a well-established constitutional claim, not a constitutional claim yet to be established. The interests of the states in their contemporaneous objection rules, a major basis for the holding of Wainwright, are not implicated where changes in law could not have been anticipated before trial. The state interests which are relevant to changes in constitutional law are taken into account in the

retroactivity determination itself. Similarly, considerations concerning defense counsel's conduct of a trial and whether counsel's tactical choices can bind the defendant, as implicated by Wainwright, have no application where constitutional changes could not be anticipated and such choices were not being made.

Lower federal courts have struggled with the question of application of Wainwright to retroactivity cases largely because of this Court's dictum in Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977). However, the application of Wainwright through this dictum would undermine the holding of Hankerson that new constitutional rules intended to protect the integrity of the fact-finding function of trials must be held fully retroactive. Thus, application of Wainwright in this

situation would not only be illogical, such application would threaten to undermine this Court's decisions that certain vital constitutional rules are to be applied fully retroactively.

The doctrine of Fay v. Noia, 372 U.S. 391 (1963) continues to provide the correct standard for determining whether habeas petitioners raising the application of fully retroactive constitutional decisions to their earlier trials must be heard on the merits. The Fay rule, in conjunction with the doctrine of harmless constitutional error, will provide adequate protection for state interests with respect to fully retroactive constitutional decisions.

ARGUMENT

THE JUDGMENT OF THE SIXTH CIRCUIT TO HEAR THESE HABEAS CORPUS CLAIMS ON THE MERITS WAS CORRECT ON THE ALTERNATE GROUND THAT WAINWRIGHT V. SYKES DOES NOT GOVERN THE CLAIMS RAISED.

The Sixth Circuit decided the cases at bar under the assumption that the question whether petitioners'[1] habeas corpus petitions may be heard by a federal court is governed by Wainwright v. Sykes, 433 U.S. 72 (1977). See, e.g., Isaac v. Engle, 646 F.2d 1129, 1133 (6th Cir. 1980)(en banc); Bell v. Perini, 635 F. 2d 575, 577-578 (6th Cir. 1980). However, as is shown herein, this assumption was unwarranted: Wainwright is inapplicable because petitioners raise claims under substantive constitutional

[1]Respondents in this Court are herein denominated "petitioners" because they filed habeas corpus petitions in the District Court. Petitioners in this Court, officials of the State of Ohio, are herein denominated "the State".

decisions which must be applied retroactively to petitioners' trials. The Sixth Circuit was thus correct, on the grounds presented here as well as those articulated in its opinions, in hearing petitioners' claims on the merits.

A. A Habeas Corpus Petitioner's Claim Of Unconstitutional Conviction Under A Fully Retroactive Substantive Constitutional Decision Rendered After Petitioner's Trial Is Not Subject To The Rule of Wainwright v. Sykes.

This Court has repeatedly held fully retroactive due process decisions which enforce the basic constitutional requirement that the prosecution bear the burden of proof of criminal conduct beyond a reasonable doubt. Ivan V. v. City of New York, 407 U.S. 203 (1972) (holding fully retroactive the rule of In re Winship, 397 U.S. 358 (1970); Hankerson v. North Carolina, 432 U.S. 233 (1977) (holding fully retroactive the rule of

Mullaney v. Wilbur, 421 U.S. 684 (1975)). In so doing, the Court has of course applied the accepted analysis for determining retrospective application, which has developed from decisions such as Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967). Briefly stated, the Court generally examines three factors to determine whether a rule should be retroactive: the purpose to be served by the new rule; the extent of reliance by law enforcement authorities on the old standards; and the effect retroactive application would have on the administration of justice. Stovall v. Denno, supra, 388 U.S. at 296-297. However, the purpose of the rule may be controlling, and when the major purpose of a new rule is to overcome an aspect of the criminal trial process which substantially impairs its truth-finding

function, the new rule is made fully retroactive whatever the extent of past reliance or burden on the administration of justice. Hankerson v. North Carolina, supra, 432 U.S. at 241-244. In addition, the retroactivity of some new constitutional decisions, generally those which would preclude a trial at all, is judged under a slightly different analysis. See Robinson v. Neil, 409 U.S. 505 (1973) (double jeopardy claim).

This Court has applied the above tests to hold fully retroactive relatively few new constitutional rules; the rules held fully retroactive have usually involved basic, non-procedural, rights or those rights directly related to the integrity of the fact-finding process. See, e.g., Berger v. California, 393 U.S. 314 (1969) (confrontation claim); Robinson v. Neil, supra, (double Jeopardy); Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (right to

counsel at trial); Hankerson v. North Carolina, supra (due process standard of guilt beyond a reasonable doubt). On the other hand, the Court has, at least where the purpose of a new rule does not require a contrary result, recognized the states' (and the federal government's) interests in reliance on established rules and burden on the administration of justice, and has declined to give full retroactive effect to many new constitutional decisions. See, e.g., Linkletter v. Walker, supra (Fourth Amendment exclusionary rule retroactive only to cases pending when new rule announced); Johnson v. New Jersey, 384 U.S. 719 (1966)(rights to counsel and to understanding of warnings during custodial interrogation applied only to trials begun after new decisions); De Stefano v. Woods, 392 U.S. 631 (1968) (right to jury trial held applicable only to trials beginning after

new decision); Stovall v. Denno, supra (counsel during identification procedures required only after date of new decision).

This Court thus takes into account, in the determination whether to apply new decisions retrospectively, the states' interests in the integrity of their criminal justice systems, and in the finality of criminal judgments rendered under the belief that established procedures and rules were constitutional. And when, after the appropriate interests have been considered, a new rule is nevertheless deemed so basic that it must be given full retroactive effect, relief has been granted even in the absence of objection during the prosecution which preceded the new decision. See, e.g., Robinson v. Neil, 409 U.S. 505 (1973) (both state and federal courts allowed double jeopardy retroactivity claim to be raised despite guilty plea, no objection in trial

court, and prior unsuccessful habeas corpus petition raising double jeopardy claim); McConnell v. Rhay, 393 U.S. 2 (1968) (state court and this Court heard claim of retroactivity of requirement of counsel at deferred sentencing apparently raised for first time on state habeas).

The allowance of habeas relief where new constitutional rules have been found so basic as to be fully retroactive is obviously based on the reasonable perception that defendants and their counsel cannot be held to anticipate changes in the law, and that lack of anticipation cannot be used to deny these vital rights. As this Court said with respect to a rule held partially retroactive: "Defendants can no more be charged with anticipating [the new] decision than can the states". O'Connor v. Ohio, 385 U.S. 92, 93 (1966) (applying to defendant who first

raised the issue on petition for certiorari in this Court the rule of Griffin v. California, 380 U.S. 609 (1965), which is retroactive to cases pending when it was announced).

Winship and Mullaney were held fully retroactive because the rules in those cases are so intimately connected with the accuracy of past verdicts: the rules were established "to prevent the erroneous conviction of innocent persons". Hankerson v. North Carolina, supra, 432 U.S. at 239; see also Id. at 240-244. The substantive rule under which petitioners in the instant cases seek relief is exactly the same type of rule. Isaac v. Engle, supra, 646 F.2d at 1134-1136 (en banc plurality opinion).[2]

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[2]The argument herein assumes that petitioners' trials suffered from Winship-Mullaney defects, as was found by the Sixth Circuit. Inso far as the correctness of the Circuit's conclusion in this

Because the accuracy of convictions obtained in violation of such rules is cast into doubt, the rule must be applied retroactively to petitioners' convictions, and petitioners may raise its application to them in federal habeas corpus proceedings.

Wainwright v. Sykes, 433 U.S. 72 (1977) does not, by itself, alter any of the above. Wainwright involved the question whether the failure to raise a well-established constitutional question[3] before trial as required by a state rule could prevent a hearing on the merits of the claim in a habeas proceeding in federal

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2(cont.)
regard is an issue in this Court (see Brief of Petitioners at 18-24), such issue is beyond the scope of this Brief.

[3]The issue raised was whether Sykes' confession should not have been admitted because he did not understand pre-confession warnings of his constitutional rights. 433 U.S. at 75.

court. This Court held that such a failure could prevent a hearing on the merits, absent a showing of cause for the failure to raise the issue and prejudice from the alleged constitutional violation. However, neither the holding nor the reasoning of Wainwright apply to constitutional claims not reasonably foreseeable by the time of trial. The state's interests in enforcement of its legitimate procedural rules, which form much of the basis for Wainwright (see 433 U.S. at 88-90), are simply not implicated where a defendant seeks relief under a new rule which neither prosecution nor defense anticipated would be promulgated and then applied retroactively. See Myers v. Washington, 646 F.2d 355, 359-360 (9th Cir. 1981). Moreover, as is shown above, the state's interests which are most relevant in this context,

those interests relating to finality and whether past convictions must nevertheless be re-examined in light of new constitutional rules, have already been taken into account in the retroactivity determination itself.

Another aspect of Wainwright further shows that it is not applicable to issues involving rules promulgated after trial and held retroactive. Wainwright places the focus of determinations of procedural default and forfeiture squarely on the conduct of defense counsel during trial[4], and suggests that counsel's conduct may

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[4] See, e.g., "The Supreme Court, 1976 Term", 91 HARVARD L. REV. 1, 217-221 (1977); Schwarzer, "Dealing With Incompetent Counsel - The Trial Judge's Role", 93 HARVARD L. REV. 633, 633-649 (1980); Cover and Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court" 86 YALE L.J. 1035, 1072-1086 (1977); Hill, "The Forfeiture Of Constitutional Rights In Criminal Cases", 78 COLUMBIA L. REV. 1050, 1067-1070 (1978).

sometimes be seen as binding on the defendant. See Wainwright, 433 U.S. at 92-94 (concurring opinion of Burger, C.J.) However, no matter what the ultimate scope of such reliance on counsel with respect to previously well-established constitutional claims, such a doctrine could not reasonably be extended to those claims which could not have been anticipated by defendants or their counsel. Even competent attorneys cannot be seen as binding their clients on issues such attorneys could not be required to recognize.[5] Again, Wainwright does not

[5]The very phraseology courts use to determine Wainwright issues, such as "defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right" (Wainwright, 433 U.S. at 90); and "tactical considerations" (Francis v. Henderson, 425 U.S. 536 at 540, quoting Davis v. United States, 411 U.S. 233 at 241 (1973), have no discernible meaning in this context. Such phrases do not describe the usual pre-retroactivity situation, in

apply.

Lower federal courts, have, despite the above, felt constrained to struggle with the application of Wainwright to claims such as those in the present case largely because of this Court's dictum in Hankerson v. North Carolina, supra, 432 U.S. at 244, n.8.[6] Compare the Sixth

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5(cont.)
which defendants and their counsel have no chargeable knowledge that rights are being violated, and are not making choices whether or not to raise an issue. Even the idea of a "failure to raise" an issue has little meaning here, since the phrase implies at least that a choice was apparent but not recognized, or that a possibility was recognized but not pursued. Before a new rule later held retroactive is even announced, few if any such actions or failures to act were occurring.

[6]"Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many

Circuit panel decision in one of the present cases, Isaac v. Engle, 646 F.2d 1122 (6th Cir.1980) (Wainwright does not apply) with the en banc decision, Isaac v. Engle, 646 F.2d 1129, 1133 (6th Cir. 1980) (opinion of Brown, J.) (Wainwright applies, Hankerson dictum adverted to). Compare also Myers v. Washington, supra, 646 F. 2d at 359-360 (Wainwright does not apply to issue which could not have been anticipated); with Cole v. Stevenson, 620 F. 2d 1055, 1059-1062 (4th Cir.1980) (en banc) cert. denied, _____ U.S. _____, 101 S. Ct. 545 (1980) (Hankerson dictum is

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6 (cont.)
defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g.,Fed. Rule Crim. Proc. 30 ".

controlling; cf. dissenting opinions).

It is respectfully submitted that the dictum in footnote 8 of Hankerson should be abandoned lest it swallow not only the holding of Hankerson, but this Court's entire line of decisions holding that certain constitutional requirements are so basic that they must be retroactively applied. This danger is highlighted by a leading commentator on questions of state procedural grounds sufficient to prevent federal review[7], who, in an article largely supportive of this Court's adoption in Wainwright of an "adequate state ground" analysis, is driven to write:

> A remaining problem involves the failure of counsel to anticipate, by appropriate submission in the original

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[7] See, in addition to the article quoted in the text: Hill, "The Inadequate State Ground", 65 COLUMBIA L. REV. 943 (1965).

proceeding, a subsequent change in constitutional law, proclaimed by the Supreme Court with retroactive effect. The decision of the Court to make its new rule retroactive would be reduced to a mockery if the right of the prisoner depended on the foresight of counsel in anticipating the new constitutional development. In 1966, the Court held explicitly "that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right". O'Connor v. Ohio 385 U.S. 92, 93 (1966). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 142-145 (1967) (Harlan J., plurality opinion); id. at 172 n. 1. (Brennan, J., concurring in part and dissenting in part). However, six days prior to the decision in Wainwright, the Court indicated that it was of a contrary mind, in a dictum that made no reference to earlier cases. Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977). It is submitted thac the rule of O'Connor is more likely to prevail to the extent that the Court intends full retroactivity for newly-proclaimed constitutional rights.

. . .

The problem of retroactivity is a difficult one, and should be

> dealt with forthrightly. The writer cannot believe that the solution proposed in the Hankerson dictum will long commend itself to the Court.

Hill, "The Forfeiture of Constitutional Rights In Criminal Cases", 78 COLUMBIA L. REV. 1050, 1078-1079, n. 160 (1978) (excerpts) (emphasis added).

Similarly, Judge Friendly, clearly an advocate of some of the restrictions on the writ which this Court has recently established,[8] would except from those restrictions petitions based on rules retrospectively applied precisely because this Court's "retroactivity" analysis provides sufficient safeguards to the interests of federalism:

> New constitutional developments relating to criminal procedure are another special

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[8] See, e.g., Friendly, "Federalism: A Foreword" 86 YALE L.J. 1019, 1031 (1977) ("applaud[s]" result in Stone v. Powell, 428 U.S. 465 (1976)).

> case. The American Bar Association Report [ABA Standards Relating To Post-Conviction Remedies, Approved Draft 1968] says that these produce a growing pressure for post-conviction remedies. But here the Supreme Court itself has given us the lead. In only a few instances has it determined that its decisions shall be fully retroactive ...In most cases the Court has ruled that its new constitutional decisions concerning criminal procedure need not be made available for collateral attack on earlier convictions... While neither a state nor the United States is bound to limit collateral attack on the basis of a new constitutional rule of criminal procedure to what the Supreme Court holds to be demanded, I see no occasion to be holier than the pope.
>
> None of these four important but limited lines of decision [retrospective application was one of four] supports the broad proposition that collateral attack should always be open for the asserted denial of a "constitutional" right, even though this was or could have been litigated in the criminal trial and on appeal.

Friendly, "Is Innocence Irrelevant?

Collateral Attack On Criminal Judgments",

38 CHICAGO L. REV. 142, 153-154 (1970) (footnotes omitted). See also Westen, "Away From Waiver: A Rationale For The Forfeiture Of Constitutional Rights In Criminal Procedure", 75 MICHIGAN L.REV. 1214, 1245 (1977)("intimate connection between retroactivity and forfeiture", defendant entitled to raise claim which has been held "constitutionally retroactive" despite lack of objection at earlier stage).

This Court in Hankerson v. North Carolina, supra, repeatedly stated that considerations of impact on administration of justice would not preclude the full retroactive effect of new constitutional rules intimately connected with the integrity of the fact-finding process. See 432 U.S. 241, 243. However, the Hankerson dictum discussed above threatens to resurrect impact on the administration of justice in a new and irrational form.

Application of Wainwright through the Hankerson dictum raises the danger that retroactivity questions may turn not on factors deemed relevant by this Court, but rather on the question, irrelevant in this context, whether petitioner can show why defense counsel did not object under a rule not yet formulated [9]. See Cole v. Stevenson, supra, 620 F.2d at 1068-1071 (dissenting opinion). Past verdicts rendered seriously questionable under Winship and Mullaney are not less questionable because there was no objection. The Hankerson dictum should not be used to undermine,by incorrectly bringing Wainwright considerations into play, the actual holding of Hankerson.

B. Fay v. Noia Provides The Proper Standard For Determining When A Federal

[9]"Cause" under Wainwright is clearly present in these cases, as the Sixth Circuit found. However, where, as here, Wainwright does not apply, petitioners should not bear the burden to show cause.

Court Should Decline To Hear A Habeas Corpus Claim Of Application Of A Fully Retroactive Constitutional Decision Rendered After The Petitioner's Trial.

This Court held in Fay v. Noia, 372 U.S. 391 (1963) that only if the state could show that a habeas petitioner had deliberately bypassed the raising of a constitutional claim at an earlier stage would federal courts decline to hear such claims. The deliberate bypass standard of Fay was abrogated as to at least some constitutional claims in Wainwright v. Sykes, supra, and was replaced with the cause-prejudice test. However, in Wainwright this Court left open the question of the continued viability of the Fay standard in other areas. Wainwright, supra,433 U.S. at 88, n.12. As is shown below, the Fay standard should be applied to cases raising retroactivity claims.

The Wainwright standard is not applicable to habeas petitions raising the

application of retroactive constitutional rules, for the reasons stated in § A., above. As has been shown, in the normal case of this type, there will be no decision of any sort whether to raise application of a rule yet to be born, and the retroactivity test itself adequately protects relevant state interests by allowing few rules to be held fully applicable to past convictions. However, it is conceivable that the constitutional significance of a practice later held to violate a new constitutional rule was actually appreciated by the defendant and defense counsel and a conscious tactical decision was made to forego raising the issue in some few cases. In such circumstances, the state has a legitimate interest in precluding further litigation of the claim. Thus the Fay standard should be applied, al-

lowing the state to show deliberate bypass in the exceptional case. Application of this standard will protect defendants who, along with their counsel, had no appreciation that their rights would be violated by certain jury instructions, yet will protect the criminal justice system against true abuse when deliberate bypass has occurred.

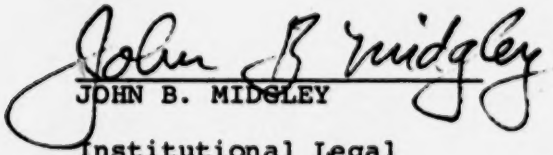
The "harmless constitutional error" doctrine of Chapman v. California, 386 U.S. 18 (1967) also will continue to protect states against reversal of convictions where unconstitutional instructions could not have affected the outcome. See Sandstrom v. Montana, 442 U.S. 510, (1979) (remanded for determination of harmless error by state courts). This doctrine, along with the rule of Fay, will amply protect those state interests which remain once a new constitutional decision

has been held fully retroactive.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit Court of Appeals to hear petitioners' constitutional claims on the merits was correct and should be affirmed.

Respectfully submitted
this 5th day of August,
1981.



JOHN B. MIDGLEY

Institutional Legal
Services Project
1702 Smith Tower
Seattle, WA 98104

(206) 464-5921

ATTORNEY FOR AMICUS
CURIAE

THE UNIVERSITY OF AKRON
AKRON, OHIO 44325

School of Law
Legal Clinic/Appellate Review Office
C. Blake McDowell Law Center
Phone: (216) 375-7751

July 23, 1981

John Midgley, Esquire
Evergreen Legal Services
Institutional Legal Services Project
1702 Smith Tower
Seattle, Washington 98104

Re: Perini v. Bell
Engle v. Hughes
No. 80-1430

Dear Mr. Midgley:

As counsel for Mr. Bell and Mr. Hughes in the above-referenced case, I hereby give written consent for the Evergreen Legal Services Project to appear and file a brief as amicus curiae. It is my understanding that this letter will comply fully with Rule 36.2 of the United States Supreme Court Rules.

If any further information is required by the Court, please let me know.

Very truly yours,

Richard L. Aynes

RLA:th

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State of Ohio
Office of the Attorney General

William J. Brown
Attorney General

Bruce J. Rakay
First Assistant Attorney General
James R. Rishel
Chief Counsel
Joel S. Taylor
General Counsel
Henry E. Helling, III
Executive Assistant Attorney General
G. Duane Welsh
Deputy Attorney General

July 27, 1981

Mr. John Midgley
Senior Attorney
Evergreen Legal Services
1702 Smith Tower
Seattle, Washington 98104

Re: Engle v. Isaac

Dear Mr. Midgley:

This is to acknowledge receipt of your request for consent to amicus participation in the above styled case. In the best interests of my clients however, I will not accede to your request. The case is already being briefed by the U.S. Justice Dept. and the Ohio Public Defenders Association as amici for the respective parties. I do not believe an additional brief would further define the issues.

Respectfully yours,

WILLIAM J. BROWN
Attorney General

SIMON B. KARAS
Assistant Attorney General
(614) 466-5414

SBK:lsa

State Office Tower / 30 East Broad Street / Columbus, Ohio 43215

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No. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Petitioner

vs.

LINCOLN ISAAC, Respondent

E.P. PERINI, Petitioner

vs.

KENNETH BELL, Respondent

TED ENGLE, Petitioner

vs.

HOWARD HUGHES, Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR OHIO CRIMINAL DEFENSE LAWYERS ASSOCIATION

AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

GREGORY L. AYERS
8 East Long Street
Room 421
Columbus, Ohio 43215
(614) 464-0335

Counsel for *Amicus Curiae*

OHIO CRIMINAL DEFENSE LAWYERS ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Ohio Criminal Defense Lawyers Association (formerly Ohio Public Defenders Association) a non-profit organization, was incorporated under the laws of Ohio in 1973. Its purpose is to protect the rights of the accused, provide continuing education for the criminal defense bar, and to improve the criminal justice system. Our membership of four hundred represents all facets of criminal defense work, and includes public defenders, private counsel, law school faculty and law students. The members of the Association represent clients involved in an estimated fifty-five percent of all misdemeanor and seventy percent of all felony cases arising annually in Ohio. With a membership comprising such a substantial percentage of the Ohio criminal bar, the Association is concerned with

the cases at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants.

The Association's Amicus Committee has filed briefs in this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Court, Northern District of Ohio, in other actions which involved the rights of criminal defendants. The Association filed an amicus brief on behalf of respondents in the Court of Appeals below.

The instant cases are of interest to the Association and its members for several reasons. To begin with, they initially arose in Ohio and concern interpretations of Ohio statutory, procedural, and common law. The issues presented by these cases further involve defense counsel's role at trial as an

advocate and what is to be expected of him in terms of objecting to errors which may later be raised in federal habeas corpus proceedings. The resolution of such issues herein will have a direct impact on the daily practice of the members of the Association. In addition, the issues involved in these cases concern what a state defendant who has failed to comply with a contemporaneous objection rule must show in order to obtain relief in a federal habeas corpus proceeding. Finally, other Ohio defendants, similarly situated to respondents herein, are being represented by members of the Association and will be directly affected by the outcome herein.

All parties to these cases have consented to the Association's filing a brief amicus curiae in support of respondents.

SUMMARY OF ARGUMENT

As indicated in Wainwright v. Sykes, 433 U.S. 72 (1977), the primary purpose of a contemporaneous objection rule is to make a trial as free of error as possible. Ohio has no legitimate state interests in demanding compliance with such rule when there was no basis for objection under Ohio law at the time of trial and no realistic possibility of correcting or avoiding the error. Nothing in Ohio law supported a basis for objecting to the jury instructions herein. Thus, Ohio's legitimate state interest in error-free trials would not have been furthered by requiring an objection in such circumstances. Wainwright, at 90, necessarily presumes there is some known, existing basis for an objection at the time of trial.

Even had counsel perceived a basis for objecting, it would have been futile

to object in light of the well-established law. There was no realistic possibility of the trial court going against prior Ohio law. Estelle v. Smith, _____ U.S. _____, 49 U.S.L.W., 4490, 4493 n. 12 (May 19, 1981), supports the conclusion that the futility of an objection will excuse a failure to object.

None of the reasons Wainwright found for the enforcement of state procedural rules are present here. The error involved strictly a legal issue requiring no evidentiary hearing. An objection would not have corrected the error. There was no evidence of "sandbagging" by trial counsel.

Counsel cannot be expected to anticipate future decisions. If he is, his failure to do so would constitute ineffective assistance. If he is not, then his failure to do so would not be ineffective assistance and should be sufficient "cause" for his failure to object.

"Cause" should not be equated with ineffective assistance as it leaves no middle ground between a deliberate bypass and ineffective assistance of counsel for recognizing the human frailties of counsel and that counsel's failure to object may be non-deliberate. There was no strategic advantage in failing to object to the error herein. Counsel further did not perceive the basis for the objection or he would have made it.

Ohio's interpretation of the "cause" requirement of Wainwright is further inconsistent with Estelle v. Williams, 425 U.S. 501 (1976). Estelle implies there is acceptable "cause" for a failure to object when counsel did not perceive the basis for objecting at the time of trial.

The State's interpretation of footnote 8 in Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8, is inconsistent with O'Connor v. Ohio, 384 U.S. 92 (1966),

which refused to bar retroactive application of the Griffin v. California, 380 U.S. 609 (1965) decision due to a failure to object. Lee v. Missouri, 439 U.S. 461 (1979), also supports the argument that counsel cannot be expected to object in anticipation of new decisions setting forth new rules of law.

Since Ohio law provides for review of "plain errors", it has no legitimate state interest in barring federal review of such errors. Wainwright implies that federal habeas courts will review "plain errors". The error herein was "plain error." Requiring respondents to prove their claims of self-defense by a preponderance of evidence, instead of the state being required to disprove them beyond a reasonable doubt, per State v. Robinson (1976), 47 Ohio St. 2d 102, substantially impaired the jury's truth-finding function. The error here went

to the central issue of guilt or innocence and infected the basic fairness of the trial itself. It furthered increased respondents' risk of conviction. An improper definition and placement of the burden of proof critically affects the jury's truth-finding function. Hankerson, 432 U.S. at 243. In such circumstance, retroactive application is imperative. Due process was also violated since the prosecution was not required to prove the absence of self-defense which was essential to prove guilt under Ohio law, as construed by Robinson. Due process requires that Ohio follow the standards it has set up to determine guilt.

The Ohio Supreme Court has refused to consider the above errors as "plain errors". However, since the Ohio courts do review "plain error" in jury instructions, this Court has jurisdiction to

determine if Ohio's action in denying plain error review is, in effect, an avoidance of a federal right. Williams v. Georgia, 349 U.S. 375 (1955). Additionally, because Ohio's application of its "plain error" rule is arbitrary and unreasonable, a federal court is not bound by it and may review and determine what should have been considered "plain error" under Ohio law.

Since the truth-finding function of the jury was substantially impaired, respondents' trials were fundamentally unfair. The writ of habeas corpus is to protect persons from deprivations of liberty in violation of constitutional rights and should be available to remedy such injustices. The state's interest in finality and procedural rules should not take precedence over our societal interest in protecting the innocent by guaranteeing the basic fairness and integrity of

criminal trials. Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1976). Respondents constitutional claims bear directly on their innocence. Broad habeas corpus relief should be available to insure that no innocent person suffers an unconstitutional loss of liberty. Since Ohio has refused to afford respondents a remedy to redress the constitutional errors at their trials, federal habeas corpus relief should be granted.

ARGUMENT

Introduction

This case presents for review several important issues dealing with the availability of the writ of habeas corpus to remedy constitutional errors which were not objected to in the state courts at the time of trial. The error common to respondents' trials involved the courts' requiring respondents to prove their

claims of self-defense by a preponderance of evidence. Subsequent to respondents' trials, in State v. Robinson (1976), 47 Ohio St. 2d 102, this burden of proof was determined to be erroneous. Robinson held that the state had the burden of disproving a claim of self-defense beyond a reasonable doubt once sufficient evidence of it was raised. Id., at 113. Since respondents did not object to such error at their trials, Ohio sought to invoke its contemporaneous objection rule to bar federal review of said error. See Wainwright v. Sykes, 433 U.S. 72 (1977). In this brief, amicus will basically deal with three issues. First, amicus will address whether Ohio's contemporaneous objection rule should bar federal habeas review of respondents' claims under this Court's decision in Wainwright. Secondly, amicus will discuss the particular constitutional errors

involved herein and whether Ohio's contemporaneous objection rule bars federal habeas review of them as "plain errors." Finally, amicus will indicate why the writ of habeas corpus should be available to remedy the constitutional violations herein.

I

A STATE'S CONTEMPORANEOUS OBJECTION RULE SHOULD NOT BAR FEDERAL HABEAS REVIEW OF AN UNOBJECTED TO FEDERAL CONSTITUTIONAL ERROR OCCURRING DURING A STATE TRIAL WHERE THERE IS NO KNOWN EXISTING LEGAL BASIS FOR SUCH OBJECTION AND THE PURPOSE BEHIND SUCH RULE WOULD, IN ANY EVENT, NOT HAVE BEEN SERVED BY A TIMELY OBJECTION.

Under Fay v. Noia, 373 U.S. 391, 439 (1963), state defendants were permitted to raise federal constitutional claims in federal habeas proceedings, despite a state procedural default foreclosing state review, absent a knowing and

intelligent waiver of the claim or a deliberate by-pass of state remedies. The holding of Fay was narrowed in Wainwright v. Sykes, 433 U.S. 72 (1977). Under Wainwright, a state defendant must now show "cause" for his failure to comply with a state procedural rule and "prejudice" resulting therefrom. Id., at 87. While amicus submits respondents have made such a showing herein, it is initially evident that the enforcement of Ohio's contemporaneous objection rule in these cases would not serve any legitimate state interest.

This Court made clear in Wainwright that the primary purpose behind a state's contemporaneous objection rule is to make a trial "as free of error as possible." Id., at 90. Counsel's objection thereby allows the court to avoid or correct such error. Ibid; Henderson v. Kibbe, 431 U.S. 145, 158 (1977) (Burger, C.J.,

concurring). This is the express purpose of the Ohio rule. See State v. Williams (1977), 51 Ohio St. 2d 112. A fortiori, where, as in the instant case, such purpose would not have been furthered, i.e., the error would not have been realistically corrected or avoided, Ohio does not have a legitimate state interest in demanding compliance with such rule or insisting that non-compliance bars federal review of such error. See Henry v. Mississippi, 379 U.S. 443 (1965).

The State of Ohio candidly concedes that nothing in Ohio law supported an objection to the court's charge to the jury on the burden of proof with regard to self-defense. See Brief of Petitioner, 12.[1] To the contrary, the Ohio Supreme Court had stated in State v. Rogers

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[1] Hereinafter cited as Br. of Pet.,....

(1975), 43 Ohio St. 2d 28, 33, albeit in dictum, that under Ohio Revised Code Section 2901.05(A) the burden was on the defense by a preponderance of evidence. This was consistent with the long-standing common law rule in Ohio. See Silvus v. State (1871), 22 Ohio St. 90; State v. Seliskar (1973), 35 Ohio St. 2d 94. As the Court below found, it was only subsequent to trial, when State v. Robinson (1976), 47 Ohio St. 2d 103, was decided that there was any legal basis or authority for objecting to such a charge. (A6). Thus, at the time of the trials herein, there was no basis for counsel, or the court, to perceive the instruction as error. Therefore, even if counsel had objected, there was no realistic possibility that such error would have been corrected or avoided by the trial court. As a result, Ohio's legitimate state interest

in error-free trials is not furthered by requiring an objection in such circumstances. It necessarily follows that federal habeas review of the unobjected to error would not infringe upon such state interest.

Amicus contends the rule of Wainwright necessarily presumes that there is some known, existing federal constitutional basis for an objection at the time of trial. See Myers v. Washington, 646 F.2d 355, 359-360 (9th Cir. 1981). In his opinion for the Court, Mr. Justice Rehnquist wrote:

> If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection. Wainwright, 433 U.S. at 90.

See also, concurring opinion of Mr. Justice White, id., at 99.[2] Indeed, in Wainwright the constitutional basis for objection was well known. As indicated above, such basis was not known at the time of the trials herein.

Even assuming, arguendo, counsel perceived the objection,[3] it would have been futile, as the Court below found, for

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[2] ("Other reasons not amounting to deliberate bypass, such as ignorance of the applicable rules, would be sufficient to excuse the failure to object. . . .")

[3] There is no evidence in these cases that counsel was aware of the basis for an objection. To the contrary, Isaac's counsel told the jury in opening and closing statements that he had the burden of proving self-defense by a preponderance of the evidence (JA10), which indicates he was not aware of such objection. Hughes' counsel's general objection to the court's charge (JA48-50) likewise indicates he was not aware of such objection.

counsel to object in light of the well-established Ohio law. (A6). Amicus agrees that to require an objection under such circumstances would be to require "the doing of a vain act."[4] See United States v. Frady, 636 F.2d 506, 512 (D.C. Cir. 1980). There was simply no realistic possibility of the trial court going against prior Ohio law. Thus, Ohio's legitimate state interest in correcting or avoiding the error would not have been served by an objection. Such conclusion is supported by this Court's recent decision in Estelle v. Smith, _____ U.S. _____ (1981), 49 U.S.L.W. 4490, 4493 (May 19, 1981), in which this Court tacitly found that the futility of an objection would excuse a failure to object. See also, Rummell v. Estelle, 587 F.2d 651,

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[4] This was conclusion of the original three judge panel. (A30).

653-654 n.2 (5th Cir. 1978), aff'd on other grounds, 445 U.S. 263, 267 n.7 (1980).

Moreover, none of the reasons found by the Wainwright Court to justify enforcement of a contemporaneous objection rule are present in the situation at bar. See Myers, 646 F.2d at 359-60. There was no necessity of preserving the testimony of any witnesses when their memories were freshest. Wainwright, 433 U.S. at 88. The error herein was strictly a legal issue. There is also no evidence of "sandbagging" by counsel in hopes of raising such issue for the first time in a federal habeas corpus proceeding. Id. at 89. As indicated above, Isaac's and Hughes' trial counsel were obviously unaware of such error, which negates any possibility of "sandbagging." In addition, amicus submits that diligent defense lawyers will not "sandbag" on legal issues that can be raised on appeal.

See Spritzer, Criminal Waiver and Procedural Default, 126 U. of Pa. Law Rev. 473, 507 n. 178 (1978). On the contrary, it is the experience of amicus that trial counsel will attempt to preserve all legitimate legal issues for appeal to protect his client's interest. It is further important to recognize that most defense lawyers do not stay on their client's cases through federal habeas proceedings, making the possibility of "sandbagging" unlikely in most cases. Yackle, Postconviction Remedies, at 338 n.8 (1981).

Further, a contemporaneous objection herein would not have contributed to either making the trial error-free or to the finality of litigation. Wainwright, 433 U.S. at 88. Even had respondents objected, their objections would have been overruled, and a new trial would have been required in any event. Finally, it is folly to think that the prosecution

would agree to an instruction placing the burden on it to disprove self-defense beyond a reasonable doubt when Ohio law was to the contrary. Id., at 89.

In challenging the decision below, petitioner asserts, on the one hand, counsel should be required to anticipate future decisions to preserve the error for review, and on the other, argues that cause is not shown unless ineffectiveness of counsel is established. Br. of Pet., 13-15. Such reasoning is fallacious. If counsel is required to anticipate future decisions, his failure to do so would presumably render his assistance ineffective. No further showing would be required in order to review the unobjected to error. If counsel is not required to anticipate future decisions, then his failure to do so should not be ineffective assistance and should be sufficient "cause" for his failure to object.

The equation of "cause" with ineffective assistance would render Wainwright a nullity. There would be no need for a showing of "cause" once ineffective assistance is established. Also, it is too plain for argument that a reasonably competent defense attorney cannot be expected to anticipate future decisions, which overrule established law, at the time of trial. See McMann v. Richardson, 379 U.S. 759, 771 (1970). As the District of Columbia Court of Appeals found in an identical situation, "[s]uch a suggestion borders on the absurd." Frady, 636 F.2d at 512. Accordingly, the failure to object for lack of anticipation should not be considered ineffective assistance. Petitioner's analysis leaves no middle ground between a deliberate bypass, see Fay, 372 U.S. at 439, and ineffective assistance for recognizing the human frailties of counsel and that a

reasonably competent attorney may fail to object for reasons that are not deliberate and do not necessarily render his assistance ineffective.

To be sure, the lower courts have found "cause" for reasons that fall short of a Sixth Amendment violation.[6] Moreover, some lower courts have found "cause" for counsel's lack of objection where he failed to anticipate a future decision. Myers, 646 F.2d at 360; Robertson v. Warden, 466 F. Supp. 262, 268 (D. Md. 1979); Graham v. Maryland, 454 F. Supp.

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[6] See Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); Collins v. Augur, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979) (serious misfeasance is sufficient cause), reh. en banc, 623 F.2d 929 (5th Cir. 1980); Harris v. Spears, 606 F.2d 639 (5th Cir. 1979) (inadvertent mistake, neglect, or press of circumstance sufficient cause).

643, 648 (D. Md. 1978); see also Frady, 636 F.2d at 512. If Wainwright was designed to encourage compliance with state procedural rules, such purpose is clearly not served by imposing a forfeiture when a reasonably competent attorney could or would not have complied. Yackle, Postconviction Remedies, at 350; Pedrero v. Wainwright, 590 F.2d 1383, 1390 n.5, cert. den., 444 U.S. 943. Candor compels the conclusion that the Robinson decision was a new ruling, and trial counsel prior to it were justified in assuming the prior law to be valid. See Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring).

Nor does finding "cause" under the circumstances herein return Wainwright to the deliberate by-pass standard of Fay, 372 U.S. at 439. There is absolutely nothing strategic or tactical about failing to object due to ignorance or

lack of anticipation. Such acts or omissions by counsel are clearly non-deliberate and have nothing to do with strategy. Furthermore, there was no strategic advantage to be gained by respondents by failing to object. Rather, they had a substantial advantage to be gained by having the prosecution be required to disprove their claims of self-defense. It is only reasonable to conclude that counsel did not perceive such objection or else he would have made it. Therefore, counsel's failure to object cannot be considered a strategic or tactical maneuver.

Ohio's interpretation of the "cause" requirement of Wainwright is further inconsistent with Estelle v. Williams, 425 U.S. 501 (1976). Estelle held that a defendant could not be compelled to stand trial in prison clothes, but such claim could not be raised on appeal where

counsel was fully aware of it and there was not sufficient reason to excuse his failure to object. Id., at 512-513. Although Estelle was pre-Wainwright, it is quite instructive as to what is sufficient "cause" for a failure to object. The Court pointed out that counsel's failure to raise the issue in Estelle "did not result from any lack of appreciation of the issue," id. at 510, and that "[p]rior Texas cases had made it clear that an objection should be imposed." Id., at 511-512. Mr. Justice Powell, concurring, described counsel's failure to object as an "inexcusable procedural default" where an objection could have protected a substantive right. Justice Powell further noted that counsel could not claim a new issue was involved, as is the situation herein. Id., at 513-514. Amicus submits Estelle necessarily implies that there is acceptable cause for

counsel's failure to object when counsel did not perceive a basis for objecting and in fact no such basis existed at the time of trial which would have permitted the trial court to avoid the error.

The State of Ohio relies most heavily on a footnote in Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977), which indicates that states may deny the benefits of a retroactive change in the law by invoking a contemporaneous objection rule. However, as the panel opinion below noted, that issue was not before the Hankerson Court. (A27). In any event, the state's interpretation of the Hankerson footnote is not supported by precedent.[7] To begin with, it is

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[7] See Hill, The Forfeiture of Constitutional Rights In Criminal Cases, 78 Columbia Law Rev. 1050, 1079, n.160 (1980). Professor Hill states that "this writer cannot believe that the solution proposed in the Hankerson dictum will long commend itself to the Court." Hill further states such

inconsistent with O'Connor v. Ohio, 385 U.S. 92 (1966). In O'Connor, the Court considered whether the defendant's failure to object to a Griffin v. California, 380 U.S. 609 (1965), violation could bar him from asserting such claim subsequent to Griffin. Holding that O'Connor could not be barred, this Court said,

> "Defendants can no more be charged with anticipating the Griffin decision than can the States."

See also, Smith v. Yeager, 393 U.S. 122 (1968). That O'Connor is still sound precedent is evident in this Court's recent per curiam decision in Lee v. Missouri, 439 U.S. 461 (1979). Lee held the retroactive benefits of Duren v.

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dictum was couched in such broad terms that it suggests fatal consequences for procedural defaults generally, and that such view is incompatible with the decisions leading to Wainwright. Ibid.

Missouri, 439 U.S. 357 (1979), to be available only to those habeas petitioners who objected in cases where the jury was sworn subsequent to the decision in Taylor v. Louisiana, 419 U.S. 522 (1975), absent a showing of "cause" for such procedural default. Id., at 462. However, the Court noted that Duren did not "announce" any 'new standards' of constitutional law not evident from the decision in Taylor v. Louisiana. . . ." Ibid. Thus, counsel could be expected to object where he had a fair cross section claim subsequent to the announcement of the new constitutional standard in Taylor. Ergo, where a completely new rule of law has not yet been announced, counsel cannot be expected or required to object in anticipation of such decision. Indeed, it would make a mockery of a decision holding a new rule of law to be retroactive if an accused could only benefit from it by having objected. See

Hill, 78 Colum. Law Rev. at 1078, n.160. "Cause" for counsel's failure to object is apparent in such situations.

II.

OHIO'S CONTEMPORANEOUS OBJECTION RULE DOES NOT BAR STATE OR FEDERAL HABEAS REVIEW OF "PLAIN ERRORS" WHICH DENY AN ACCUSED A FUNDAMENTALLY FAIR TRIAL.

Ohio law expressly provides for the review of plain errors affecting substantial rights, notwithstanding a failure to object. Rule 52, Ohio Rules of Criminal Procedure. In doing so, Ohio concedes it has no legitimate interest in barring state or federal review of such plain or fundamental errors which occur at trial.[8] Like its federal counterpart, the plain

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[8] The above-discussed Hankerson dictum would of course not apply where the state does not bar review of an unobjected to error.

error rule under Ohio law is to be invoked "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Long (1978), 53 Ohio St. 2d 91, 97. Thus, there is no adequate and independent ground under Ohio law to bar federal review of "plain errors" which occur at trial.

Indeed, such "plain error" rule is entirely consistent with Wainwright that the "cause and prejudice" standard

> "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."

Wainwright, 433 U.S. at 91. See also, concurring opinions of Justice Stevens, id., at 97 (would permit collateral attacks where the trial violated standard of fundamental fairness); and Justice White, id., at 99 (would review "plain error");

Estelle, 425 U.S. at 514 n.2 (Powell, J., concurring) (discretion might be exercised to reverse conviction on plain error principles); County Court of Ulster County v. Allen, 442 U.S. 140, 151 n.10 (1979).[9]

To argue, as the state does herein, see Br. of Pet., 11-12, n.6, that a state's "plain error" rule does not overcome its contemporaneous objection rule, is to really deny that it is an exception to it, which it plainly is. The state's argument further overlooks the basic premise of the Wainwright rule:

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[9] Several lower court decisions indicate that "plain errors" under State law can be reviewed in federal habeas proceedings despite a failure to object. Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978), cert. denied, 439 U.S. 955; Canary v. Bland, 583 F.2d 887 (6th Cir. 1978); Cook v. Bordenkircher, 602 F.2d 117 (6th Cir. 1979), cert. denied, 444 U.S. 936; Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978); Krzeminski v. Perini, 614 F.2d 121 (6th Cir. 1980); Carr v. Alabama, 586 F.2d 462 (5th Cir. 1978); Cf., Hockenbury v. Sowders, 633 F.2d 443 (6th Cir. 1980).

that there is some legitimate state interest furthered by its application. With respect to "plain errors," there is none. Furthermore, cutting off federal collateral review of "plain errors" under state law gives greater preclusive effect to procedural defaults by state defendants than to similar defaults by federal defendants. Cf., Francis v. Henderson, 425 U.S. 536 (1977); Kaufman v. United States, 394 U.S. 217, 228 (1969). Ohio's contention, which would result in such unequal treatment of the collateral claims of state and federal defendants, is patently unreasonable, unfair and should be rejected. Francis, at 541-542. See Kinnamon, Defenses To The Preclusive Rule of Wainwright v. Sykes, 28 Drake Law Rev. 571, 590 (1979).

Turning to the error in the present cases, amicus submits it constituted "plain error" and resulted in a miscarriage

of justice to respondents. Respondents were tried and convicted under an improper burden of proof. Respondents were required to prove their defenses of self-defense by a preponderance of evidence. The Ohio Supreme Court's subsequent decision in State v. Robinson (1976), 47 Ohio St. 2d 103, held retroactive in State v. Humphries (1977), 51 Ohio St. 2d 95, makes clear that such burden was improper. Under Robinson, at 108, 113, a defendant is only required to present sufficient evidence to raise such defense and then the prosecution has the burden of disproving it beyond a reasonable doubt. See also, Humphries at 101. Because the state was not required to carry such burden, respondents were denied due process of law and a fair trial.

Of course, the test in a federal habeas proceeding is whether the erroneous instruction "so infected the entire trial

that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154 (1977). Amicus submits it is manifestly evident that the error herein went to the central issue of guilt or innocence and infected the basic fairness of the trial itself. See Berrier v. Egeler, 583 F.2d at 522.

This fundamental error in the burden of proof substantially impaired the jury's truth-finding function and its ultimate determination of guilt or innocence. It is clear that where the burden of proof lies may be decisive of the outcome. Speiser v. Randall, 357 U.S. 513, 525 (1957). The State even concedes this. Br. of Pet., 22. Where the prosecution must bear a lesser burden of proof, the risk of factual errors that result in convicting the innocent is far greater. In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Where, as

herein, the burden is on the accused, rather than the prosecution, to prove the critical fact in dispute, the risk of convicting an innocent person is even greater. See Berrier, at 522. If the function of legal process is to minimize the risk of erroneous decisions, Addington v. Texas, 441 U.S. 418, 423, such result cannot be tolerated. In a criminal case, such risk to a defendant must be minimized as much as possible. Addington, id., at 425. Due process is clearly not achieved where, as here, the risk of an erroneous decision is increased by the improper allocation of the burden of proof. See Frady, 636 F.2d at 513-514.

Hankerson v. North Carolina, 432 U.S. 233, 243 (1977), expressly recognizes that an improper definition and placement of the burden of proof critically affects

the truth-finding function of the jury.[10] Moreover, it is important to realize that the jury's truth-finding function in Hankerson was impaired in exactly the same manner as in the instant case. Hankerson, like respondents, was improperly required to prove his claim of self-defense by a preponderance of evidence. Id., at 238. A subsequent decision of the North Carolina Supreme Court held that such burden of proof was improper; and that the prosecution, per Mullaney v. Wilbur, 421 U.S. 684 (1975), had the burden of disproving such claim of self-defense beyond a reasonable doubt. Ibid. This Court reversed the North Carolina Supreme Court's refusal to hold Mullaney retroactive. In doing so, this Court necessarily recognized that the factfinding function

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[10] See Judge Celebreeze's concurring opinion in panel decision below. (A34).

of the jury had been substantially impaired which raised serious questions about the accuracy of the verdict. Id., at 243. The only difference between respondents' situation and Hankerson's is that the Ohio Supreme Court's redefinition of the burden of proof was on statutory grounds, and the North Carolina Supreme Court's was on constitutional grounds. Nevertheless, as Judge Celebreeze, concurring in the panel decision below, stated

> Redefining the burden of proof placed upon a defendant, whether it be by a new constitutional rule or by a new statutory interpretation of constitutional dimension, has a substantial impact upon a criminal trial's truth-finding function. In such situations, retroactive application is imperative. Hankerson, supra, at 241 quoting Ivan V., v. City of New York, 207 U.S. 203, 204-05 (1972). (A34-35).

At least one Ohio court has recognized this with respect to the error herein:

> To properly decide a criminal case, it is essential that the jury has a clear understanding of which party has the burden of proof. Without such an understanding, the jury cannot possibly properly perform its function. When in a criminal case the trial court erroneously places the burden of proof on the defendant, that error affects substantial rights of the accused and affects the basic fairness, integrity and public reputation of the judicial process. Such an error is plain error. . . .

State v. Gideons (1977), 52 Ohio App. 2d 70, 78. Cf., State v. Long; see also United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977).

The erroneous instruction herein also violated due process in another way. Under Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York, 432 U.S. 197 (1977), the state was required to prove all facts essential to guilt under Ohio law. Petitioner contends that the affirmative defense of self-defense is a

device of confession and avoidance and represents a collateral matter to be determined wholly independent of the elements of the crime. Br. of Pet., 18. See State v. Poole (1973), 33 Ohio St. 2d 18, 19. Even assuming, arguendo, this to be true prior to 1974,[11] Ohio Revised Code Section 2901.05, as interpreted by Robinson, clearly changed Ohio law in this respect. Robinson made clear that once sufficient evidence of self-defense was introduced at trial, guilt could not be found unless the prosecution proved the absence of self-defense beyond a reasonable doubt.

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[11] Amicus will not address this issue, but would agree with counsel for respondents Bell and Hughes that even prior to 1974 the claim of self-defense negated a fact necessary for proof of a crime, i.e., unlawfulness. See State v. Silvus, 22 Ohio St. at 99. To hold otherwise is to presume the lawful act of self-defense to be unlawful unless the accused rebuts such presumption by the requisite degree of proof for establishing self-defense.

Instead of self-defense being a collateral matter, it effectively bore a necessary relationship to proving the elements of the crime. Cf., Patterson, 432 U.S. at 205-207. Thus, under Ohio law, as construed by Robinson, a necessary fact essential to guilt, where there was sufficient evidence of self-defense, was that the accused did not act in self-defense. In other words, the state could not prove the crimes with which respondents were charged and treat them as guilty parties unless it disproved their claims of self-defense beyond a reasonable doubt. Because the state was not required to do this in the cases at bar, respondents' due process rights were violated.

The prosecution's burden of proof under Ohio law, as construed by Robinson, was effectively no different than if Ohio law had required it to disprove

self-defense as an element of the crime. Cf., Hankerson, 432 U.S. at 238. Because Ohio chose to impose such burden as a matter of statutory interpretation rather than as an element of the crime should make no difference in terms of due process. A fair and proper determination of guilt or innocence according to the correct standards is essential to due process in any jurisdiction. To permit Ohio to convict individuals when it has not followed its own standards for determining guilt violates fundamental due process.

Unfortunately, the Ohio Supreme Court has refused to consider the above due process violations as "plain errors." State v. Long, 53 Ohio St. 2d at 97. Nevertheless, the Ohio state courts do review "plain error" in jury instructions. Krzeminski, 614 F.2d at 123 n.2; State v. Muscatello (1977), 57 Ohio App.2d 231, 240, aff'd (1978) 55 Ohio St. 2d 201.

Thus, Ohio's discretionary decision to deny that "plain error" exists does not deprive this Court of jurisdiction to review the issues herein since this Court may properly determine if Ohio is, in effect, avoiding consideration of a federal right. Williams v. Georgia, 349 U.S. 375, 383, 389 (1955).

In addition, the Ohio Supreme Court has construed its "plain error" standard to require a showing that, but for the error, the outcome of the trial would clearly have been otherwise. Ibid. Amicus submits that such a standard is so virtually impossible to meet that it is wholly illusory. To speculate on how the jury would have decided guilt or innocence had proper instructions been given invites sheer speculation of the highest order. It further requires the appellate court to engage in a factfinding function which only the jury, and not the court, can

perform.[12] In view of this, amicus submits Ohio's interpretation and application of its "plain error" rule has been arbitrary and unreasonable, at least with respect to the errors involved herein. However, a federal court is not bound by state rules of procedure that are unreasonably or arbitrarily implied. Henry v. Mississippi, 379 U.S. 443 (1965). Therefore, the federal courts below properly reviewed and determined what otherwise should have been considered "plain errors" under Ohio law.

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12 Such logic is even supported by Ohio Supreme Court precedent. See State v. Nelson (1973), 36 Ohio St. 2d 79, 85.

III

WHERE THE JURY'S TRUTH-FINDING FUNCTION IN THE DETERMINATION OF GUILT OR INNOCENCE HAS BEEN SUBSTANTIALLY IMPAIRED BY AN IMPROPER BURDEN OF PROOF, RAISING SERIOUS QUESTIONS ABOUT THE ACCURACY OF SUCH VERDICT, THE GREAT WRIT OF HABEAS CORPUS SHOULD BE AVAILABLE TO REMEDY SUCH INJUSTICE, DESPITE THE ACCUSED'S FAILURE TO OBJECT.

From the above discussion, it is apparent that the truth-finding processes of respondents' trials were substantially impaired. As a result, respondents' trials were fundamentally unfair and the reliability of the jury verdicts is questionable. In such circumstances, the Great Writ must be available to remedy such injustice. To be sure, the historic office of the writ of habeas corpus has been to protect persons from deprivations of liberty in violation of constitutional guarantees. Fay v. Noia, 373 U.S. at

401-402, 412, 426; Blackledge v. Allison, 431 U.S. 63, 72 (1977). While Wainwright narrowed the channel through which defaulting state defendants must pass, this Court did not retreat from this basic principle. The State of Ohio would have the Court do so in this case.

This case therefore presents the fundamental question of whether a state's interest in finality and procedural rules should take precedence over our societal interest in protecting the innocent by guaranteeing the basic fairness and integrity of criminal trials. Amicus submits it should not. The constitutional violations herein bear directly on an accused's innocence and therefore the basic justice of his incarceration. Stone v. Powell, 428 U.S. 465, 491-492 n.31 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 256-266 (1973) (Powell, J., concurring). The question of guilt or

innocence is clearly the central concern in a criminal trial. Stone, at 490. Errors which substantially affect that determination impugn the basic fairness and integrity of a criminal trial.

When constitutional claims bearing on innocence are involved, this Court has stated that broad habeas corpus relief should be available to provide the added assurance that no innocent person suffers an unconstitutional loss of liberty. Id., at 491-492 n.31; see also, Schneckloth, 412 U.S. at 256-266 (Powell, J., concurring). Our societal interest in protecting the innocent through the guarantee of a fair trial surely must predominate over notions of finality and state procedural concerns. See Hill, 78 Colum. Law Rev. at 1076-79. Indeed, this Court acknowledged as much in Wainwright, 433 U.S. at 91, when it stated that federal review of constitutional claims involving a miscarriage of justice

would not be precluded by procedural defaults.

Amicus certainly does not question that comity and federalism require that state procedural rules be accorded some significance. But to exalt notions of finality and formalistic rules over safeguarding the basic integrity and fairness of criminal trials plainly defeats the ends of justice and the ultimate search for truth. As Mr. Justice Powell said in his concurring opinion in Schneckloth, at 412, sacrificing finality and state procedural concerns in such circumstances should be accepted as a "tolerable price to pay for cherished standards of justice."

From the above, it is evident that Ohio has refused to provide a remedy for the federal constitutional violations

occurring during respondents' trials.[13] Under such circumstances, respondents only remedy is in federal habeas corpus. If the Great Writ is to continue to serve its historic purpose, relief must be granted respondents. As this Court said in Fay, at 441:

> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to lanquish in prison.
> * * *
> For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty

---

[13] At least in Ohio, Wainwright, 433 U.S. at 89, has clearly not had its intended effect of making state courts less stringent in the enforcement of contemporaneous objection rules.

to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization.

CONCLUSION

For the foregoing reasons, amicus submits that the judgments and decisions of the Court of Appeals in these cases should be affirmed.

Respectfully submitted,

GREGORY L. AYERS
8 East Long Street, Room 421
Columbus, Ohio 43215
(614) 464-0335

COUNSEL FOR AMICUS CURIAE
OHIO CRIMINAL DEFENSE
LAWYERS ASSOCIATION

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that three copies of the foregoing Brief For Ohio Criminal Defense Lawyers Association as Amicus Curiae In Support Of Respondents has been served on petitioners Ted Engle and E. P. Perini by forwarding such copies to the office of their counsel, Simon B. Karas, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215; and on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the office of their respective counsel, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The

University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____ day of August, 1981. I further certify that all parties required to be served have been served. The petitioners' addresses are Ted Engle, Superintendent, Chillicothe Correctional Institute, Post Office Box 5500, Chillicothe, Ohio 45601; E. P. Perini, Superintendent, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43302. The respondents' addresses are Lincoln Isaac, 310 Roy Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, Post Office Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 43302.

GREGORY L. AYERS

COUNSEL FOR AMICUS CURIAE
OHIO CRIMINAL DEFENSE
LAWYERS ASSOCIATION

Office-Supreme Court, U.S.
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CLERK

CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent Appellant

E. P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL,
Respondent Appellant

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent Appellant

AMICUS CURIAE BY OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS TED ENGLE SUPERINTENDENT AND E. P. PERINI SUPERINTENDENT

OHIO PROSECUTING ATTORNEYS ASSOCIATION
J. STANLEY NEEDLES
Prosecuting Attorney, Hancock County, Ohio
1330 North Main Street
Findlay, Ohio 45840
(419) 422-2235

SIMON B. KARAS
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

1. CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS?

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STATEMENT OF THE CASE

Isaac

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon an affirmative defense of self defense. No objection was entered to an instruction that Isaac bore the burden of proof on self defense by a preponderance of the evidence.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. Therein, Isaac relied on the newly decided case of *State v. Robinson,* 47 Ohio St. 2d 103 (1976). In *Robinson,* the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[1] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries,* 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

---

[1]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41).

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitary and capricious and thus a denial of due process. (A26. As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se requires negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents (A20) and (A21) would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

Bell

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which had had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio and the Ohio Supreme Court raising issues not pertinent herein. Said appeals were respectively denied on April 8, 1975 and September 16, 1976.

Thereafter, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction on self defense.

On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49). On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

Hughes

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial

and raised no objection to an instruction that he bore the burden of proof of the affirmative defense of self defense by a preponderance of the evidence. In fact, Hughes' counsel specifically requested the charge that was given.

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court. Said appeals were respectively denied on September 24, 1975 and March 16, 1976, both in advance of the decision in *Robinson*. No contention was made in either appeal that the instructions on self defense violated due process.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. Therein, Hughes challenged the constitutionality of the instruction on self defense.

On June 26, 1979, the district court, after interim orders requesting briefing on exhaustion of state remedies and the merits, issued its opinion denying the petition. (A62). The district court found alternatively that Hughes' burden shifting claim was waived by failure of objection and that the instruction itself did not violate federal due process.

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 21, 1980. (A61).

ARGUMENT

CAN A STATE REQUIRE A DEFENDANT TO OBJECT TO JURY INSTRUCTIONS AT A POINT WHEN THE TRIAL COURT CAN CONSIDER THE ISSUE IN GIVING ITS INSTRUCTIONS.

What is at issue in this appeal is whether the defendant must call a trial court's attention to an issue of jury instructions at trial or merely wait and take his chance, and whether he can request a jury instruction and later in a Federal Habeas Corpus repudiate his position for one that appears advantageous. In each of the cases here appealed, the defendant did not object to the trial courts instructions on the burden of proof of an affirmative defense and in *State v Hughes*, counsel requested the complained of charge be given.

Ohio law is clear on the point of objecting to jury instructions at a time when something can be done: a defendant cannot wait and raise the issue of incorrect instructions after trial. The Ohio Supreme Court, in summarizing the law in this area, said in *State v Lancaster*, 25 Ohio St. 83, 267 N.E. 2d 291 (1971):

> In the case of *State v Childs* (1968), 14 Ohio St. (2d) 56, 43 0.0. (2d) 119, 236 N.E. (2d) 545, certiorari denied, 394 U.S. 1002, we stated in paragraph three of the syllabus:
>
> "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v Glaros*, 170 Ohio St. 41, 11 0.0. (2d) 215 (166 N.E. (2d) 379), approved and followed.)" Accord *State v Johnson* (1968), 14 Ohio St. (2d) 67, 43 0.0. (2d) 126, 236 N.E. (2d) 552.
>
> We also re-assert the doctrine we stated at page 62 (of 14 Ohio St., 123 of 0.0. (2d) of the *Childs* case: "Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time. *State v Davis* (1964), 1 Ohio St. (2d) 28, 30 0.0. (2d) 16 (203 N.E. (2d)

357)." The interest of the state in the requirement of timely objection to improper evidence has been recognized in several United States Supreme Court decisions. Compare *Douglas v. Alabama* (1965), 380 U.S. 415; *Henry v. Mississippi* (1965), 379 U.S. 443.

The Respondents tried these cases without raising the issue of the burden of proof but lost, so now they are asserting the improper instruction as an error. In *State v. Tudor,* 154 Ohio St. 249, 95 N.E. 2d 385 (1950):

> A fair administration of justice requires that, when an error occurs in a trial, the trial judge should be given an opportunity, if possible, to correct it. Otherwise, a party could take a chance on success without raising any objection to such error, and then, if he failed to succeed, avail himself of an error which might otherwise have been corrected. See 3 American Jurisprudence, 25 *et seq.*, Section 246.
>
> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial judge to give faultless instructions upon every possible feature of the case. This would disregard entirely the true relationship between the court and counsel which enjoins upon counsel the duty to exercise dilligence and to aid the court, — not by silence to mislead the court into the commission of error. (Emphasis added).

This United States Supreme Court has recognized the validity of the contemporaneous objection rule. In *Hankerson v. North Carolina,* 432 U.S. 233, 244 (1977) the Supreme Court hinted at it in a footnote:

> Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burdenshifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior

to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.* See e.g., Fed Rule Crim Proc 30. (Emphasis added).

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) that court said:

> The contemporaneous-objection rule itself is by no means peculiar to Florida, and deserves greater respect than Fay gives it, both for the fact that it is employed by a coordinate jurisdiction within the federal system and for the many interests which it serves in its own right. *A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding.* It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. While the 1966 amendment to Section 2254 requires deference to be given to such determinations made by state courts, the determinations themselves are less apt to be made in the first instance if there is no contemporaneous objection to the admission of the evidence on federal constitutional grounds.
>
> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on federal constitutional grounds, the jury may acquit the defendant, and that will be the end of the case; or it may nontheless convict the defendant, and he

will have one less federal constitutional claim to assert in his federal habeas petition. If the state trial judge admits the evidence in question after a full hearing, the federal habeas court pursuant to the 1966 amendment to Section 2254 will gain significant guidance from the state ruling in this regard. Subtler considerations as well militate in favor of honor a state contemporaneous-objection rule. An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal write of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

• • • •

The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. *To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify.* Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification. (emphasis added). *Id.* at 88-90.

In *Wainwright v. Sykes,* the federal courts had ordered a hearing regarding the voluntariness of a confession where the matter had not been raised at trial and had been rejected by the state courts. The Supreme Court indicated that the Florida courts were bound by the contemporaneous objection rule indicating two bases for the rule: first that it supports finality, and second, to a lesser degree, it prevents sandbagging.

This is the issue confronting this court; and this Court has spoken giving its approval to the use of the contemporaneous objection rule.

Had this issue been raised at trial, as suggested in *Sykes,* the State might have dealt with the entire issue by assuming the burden of disproving the affirmative defense, thus avoiding the current problem. Now, long after the incident in this, and many other cases which will inevitably wind their way trough the courts in years to come, the prosecutor will have to attempt to locate real evidence, which may have been destroyed, and witnesses, who may have moved, died, or forgotten. Trying cases long after the incident is all but impossible for the State. This particularly true, in homicide cases. The issues of insanity, self defense, and intoxication are frequently involved in shootings, knifings and robberies. These factors indicate the need for the contemporaneous objection rule. Cases should be tried once, near the time of the incident, not years later when memories fade.

It is suggested that the contemporaneous objection rule applys to the constitutional claim that the Defendant should not have had the burden of proof but does not apply to statutory claim under then *Ohio Rev. Code Section* 2901.05. The resolution of both of these claims ends in the same result: an instruction by the trial judge on the burden of proof regarding affirmative defenses. If the contemporaneous objection rule applys to one reason for an instruction it applys to other reasons for an identical instruction.

The heroic effort of the Sixth Circuit to find a failure of due process creates chaos with Ohio law, *Wainwright v. Sykes* and the Constitution.

Thus, Ohio's choice of using the contemporaneous objection rule should not be overturned by this court.

CONCLUSION

The Ohio contemporaneous objection rule serves a number of purposes; one of the most important is finality. The Petitioner having failed to raise the issue at trial, cannot raise it later. This court should affirm the District Court in rejecting belated objection to the jury instructions, and reverse the United States Court of Appeals Sixth Circuit.

Respectfully submitted,

J. STANLEY NEEDLES
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5 (b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing brief have been served on James R. Kingsley, 157 W. Main Street, Circleville, Ohio, 43113, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio, 44325, counsel for Hughes, and upon Simon B. Karas, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by U.S. Mail, postage paid, this 29 day of May, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio, 43113; Kenneth Bell, #141-727 Marion Correctional Institution, P.O. Box 57, Marion, Ohio, 43302, Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

J. STANLEY NEEDLES
Counsel for Ohio Prosecuting
Attorneys' Association

AFFIDAVIT

STATE OF OHIO)
) ss.
COUNTY OF HANCOCK)

J. Stanley Needles, Prosecuting Attorney for Hancock County, Ohio, Amicus Curiae for the Ohio Prosecuting Attorneys' Association, being duly sworn, deposes and says that he deposited in the United States Mail, United States Postal Department, forty (40) copies of the Brief in the aforecaptioned matter on this 29th day of May, 1981 addressed to the Clerk of the Supreme Court of the United States of America, One (1) First Street NE, Washington D.C. 20543, postage prepaid.

_____
J. STANLEY NEEDLES

J. Stanley Needles, being first duly sworn, deposes and says that the foregoing affidavit is true.

_____
Notary Public

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CLERK

No. 80-1430

In the Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, PETITIONER

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v.

HOWARD HUGHES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will discuss the following question, which is a restatement of the first question in the certiorari petition:

Whether on collateral attack the assumed futility of objection at the time of trial is sufficient "cause" to excuse a defendant's failure to make timely objection to erroneous jury instructions.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1430

TED ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, ET AL., PETITIONERS

v.

LINCOLN ISAAC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that claims be timely raised or forfeited. The Federal Rules of Criminal Procedure expressly provide that certain types of claims must be raised before or at trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1).[1] More generally, a criminal defendant's failure to make timely objection at trial is frequently held to bar the claim, although on direct appeal an appellate court may sometimes notice plain error affecting substantial rights (Fed. R. Crim. P. 52(b)). *E.g., United States* v. *Indiviglio*, 352 F.2d 276, 279-281 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). The standard for determining when an error that was not duly objected to at trial or raised on direct

[1] Fed. R. Crim. P. 30 is virtually identical to Rule 30 of the Ohio Rules of Criminal Procedure, which is at issue in this case.

appeal can nevertheless support collateral relief is of substantial importance to the administration of justice in the federal system. The holding of the court of appeals in these cases—that the assumed futility of objection constitutes sufficient cause to excuse a failure to make timely objection—would, if sustained by this Court, substantially increase the susceptibility of otherwise final judgments in federal criminal cases to collateral attack.

STATEMENT

Isaac v. *Engle*

On May 30, 1975, an Ohio grand jury filed an indictment charging respondent Isaac with felonious assault (A. JA2). Following a jury trial, respondent Isaac was convicted of the lesser included offense of aggravated assault (A. JA6; Pet. App. A24). On September 15, 1975, Isaac was sentenced to six months to five years in prison (Pet. App. A2, A39).

None of the opinions filed in this case discusses the evidence presented at Isaac's trial.[2]

Relying on *State* v. *Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976), Isaac argued on direct appeal that, as a matter of state law, the trial court had erred in instructing the jury that the defendant had the burden of establishing self-defense by a preponderance of the evidence (A. JA11; Pet. App. A25, A40).[3] Since Isaac had failed to make timely objection to the trial court's instruction on self-defense, as required by Ohio R. Crim. P. 30, the state court of appeals refused to consider the claim on the merits, holding (A. JA11) that "[t]he failure to make such an objection waives any error * * *."[4]

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[2] No question as to the sufficiency of the evidence to support the jury's verdict was raised on direct appeal in the state courts (see A. JA7-JA11).

[3] The "erroneous" jury instruction is quoted in the Sixth Circuit panel decision in this case (Pet. App. A25 n.1).

[4] The court did note (A. JA11) that Isaac's counsel stated in both his opening and closing arguments that the burden of proof on the issue of self-defense was on the defendant. Other objections

The Ohio Supreme Court denied Isaac's motion for leave to appeal (A. JA12) and dismissed his "appeal as of right" "for the reason that no substantial constitutional question exists herein" (A. JA13).[5]

On March 31, 1978, Isaac filed a petition for federal habeas corpus (Pet. 4). Although the grounds for relief asserted (Pet. App. A39) are not entirely clear, Isaac's primary claim seems to have been that the refusal to reverse his conviction in light of *Robinson* was improper (*ibid.*). Isaac also stated (*ibid.*): "[T]he holding of the Court is contrary to the Supreme Court of the United States in regard to proving self-defense." The federal district court denied the petition without discussion of the merits, stating (*id.* at A41): "[Isaac] has not made a showing of either cause or actual prejudice. Accordingly, the Court HOLDS that he has waived his federal constitutional claim."

On appeal, a panel of the Sixth Circuit reversed (Pet. App. A24-A35). A majority of the panel held that the cause and prejudice standard established in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), was inapplicable to Isaac's claim as to the impropriety of denying him the benefit of the decision in *Robinson* (Pet. App. A31). On the merits of this claim, the panel majority held that the Ohio Supreme Court's decision to apply *Robinson* retroactively, but only in those cases in which the claim had been timely raised (*State* v. *Humphries*, 51 Ohio St.2d 95, 364 N.E. 2d 1354 (1977)), was arbitrary or capricious and therefore violative of due process (Pet App. A26-A30). Judge Celebrezze concurred (Pet. App. A33-A35).

On rehearing en banc, a four-judge plurality expressly rejected the approach of the panel majority (Pet. App.

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to the self-defense instruction, which presumably had been properly preserved at trial, were rejected on the merits (A. JA9-JA10).

[5] Under Ohio Rev. Code Ann. § 2505.29 (Page 1954), "[n]o appeal shall be filed in the supreme court unless such court or a judge thereof grants leave to file such an appeal," except "in cases involving questions under the constitution of the United States, or of this state * * *." See also Rules of Practice of the Supreme Court of Ohio, Rule II, Section 3(B).

A5), stating that "the threshold question * * * is not whether the state's limiting of the retroactive benefits of a new statutory interpretation through the use of a procedural rule is constitutional but whether that state procedural rule effectively precludes federal habeas corpus review of the underlying constitutional claim." Applying the *Wainwright* cause and prejudice standard, these four judges and one other (Pet. App. A11) concluded that Isaac had satisfied the "cause" requirement because (Pet. App. A5-A6): (1) before § 2901.05(A) was enacted, Ohio had allocated the burden of proving self-defense by a preponderance of the evidence to the defendant; (2) a dictum in an Ohio Supreme Court decision suggested that the statute had not changed the traditional rule; and (3) only after the *Robinson* decision "could Isaac [have] know[n] that the charge to the jury violated federal due process." According to these five judges (Pet. App. A6), "it would have seemed futile for Isaac to object to [the] jury instruction," and "[t]herefore, [he] had legitimate cause for his failure to object * * *." Judge Jones concurred only in the result (Pet. App. A12-A15). In his view Isaac had shown "cause" because (Pet. App. A14):

> Isaac neither knew nor could have known that the jury instructions at his trial were improper under *Robinson*, decided two years after his trial. There is no better "cause" for Isaac's failure to object to jury instructions than that the jury instructions were proper at the time of his trial.

As to prejudice, the four-judge plurality concluded that Isaac had also satisfied that requirement, since his trial testimony (Pet. App. A6 n.3) "made a substantial issue as to his self-defense contention * * *." Chief Judge Edwards agreed (Pet. App. A11); Judge Jones did not expressly address the question.

Judge Kennedy dissented (Pet. App. A21-A22) on the ground that Isaac had failed to show "cause" sufficient to excuse his procedural default; Judge Merritt agreed (Pet. App. A20).

On the merits, the four-judge plurality held that, as construed in *Robinson*, § 2901.05(A) required the prosecution to prove the absence of self-defense and, therefore, shifting the burden of persuasion on this issue to the defendant violated the Due Process Clause of the Fourteenth Amendment (Pet. App. A7-A10). Judge Edwards took the position that self-defense negatives the existence of the "criminal intent" necessary to constitute the offense of aggravated assault, and therefore due process prohibits the state from shifting the burden of persuasion on self-defense to the defendant.[6]

Judges Lively and Engel, dissenting, took the view that neither § 2901.05(A) nor the decision in *Robinson* made the absence of self-defense an element of the crime of aggravated assault; they accordingly concluded that there was no constitutional defect in respondent's trial (Pet. App. A16-A17; see *id.* at A23). Since the issue was purely one of state law, they saw no constitutional impediment to limiting the retroactive effect of *Robinson* (Pet. App. A18-A19).[7] Judge Jones, although agreeing that the issue in *Robinson* was purely one of state law, apparently concluded that the state courts were not constitutionally free to limit the retroactivity of *Robinson* (Pet. App. A13).

Bell* v. *Perini

On October 11, 1974, respondent Bell was indicted for aggravated murder (A. JA14). Following a jury trial on April 15, 1975, Bell was convicted of the lesser included offense of murder (A. JA15) and sentenced to serve 15 years to life imprisonment (Pet. App. A50).

The evidence at trial showed that on September 15, 1974, a local bartender telephoned Bell stating that five black men had just entered the Hub Cafe, where the bar-

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[6] Although Judge Merritt dissented on the "cause" issue, he noted his substantial agreement with this view of the merits (Pet. App. A20).

[7] Judge Kennedy noted her agreement with Judge Lively's view of the merits (Pet. App. A21).

tender worked, and that he feared trouble. Bell and James Clark went to the Hub Cafe, asked where the men were, and were told that they had left the premises.[8] Bell, armed with a .32 caliber revolver, left the Hub Cafe with the bartender and proceeded in the direction the five men had gone. At trial, Bell testified that as he and the bartender approached two of the men, the bartender shouted "He's got a gun," or "Watch out, he's got a gun." Bell then started shooting, and one of the two men fell to the ground. After the shooting Bell and Clark drove away in Clark's car. Later the two men abandoned Clark's car and reported it stolen (A. JA16-JA18).

On direct review the Ohio Court of Appeals affirmed the conviction (A. JA15-JA22). Bell raised no issues concerning the trial court's instruction to the jury that the defendant had the burden of proving self-defense by a preponderance of the evidence. The Ohio Supreme Court denied Bell's motion for leave to appeal (A. JA24).[9]

Bell then sought federal habeas corpus challenging for the first time the state trial court's jury instructions concerning the defendant's burden to prove self-defense by a preponderance of the evidence. The district court apparently found it unnecessary to consider whether Bell's claim was barred by the failure to make timely objection to the instruction (see Pet. App. A51 n.1), denying relief on the ground that *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), did not require the State to prove the absence of self-defense (Pet. App. A51-A55). On Bell's motion for reconsideration, the court also rejected the contention that the decision in *Robinson* was applicable even though Bell had failed to raise the issue on direct appeal (Pet. App. A56-A59).

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[8] Bell, who was also a bartender, had agreed with several other neighborhood bartenders that each of them would respond to calls for help from the others (A. JA17).

[9] But see Pet. App. A44, A45 (appeal dismissed for want of a substantial constitutional question).

On appeal, a divided panel of the Sixth Circuit reversed (Pet. App. A42-A47). The majority expressly adopted the reasoning of the plurality opinion in *Isaac* v. *Engle* on the cause and prejudice issues as well as on the merits (Pet. App. A46). One judge dissented on the ground that *Wainwright* v. *Sykes*, *supra*, barred review of Bell's claims on the merits (Pet. App. A47).

Hughes* v. *Engle

On December 16, 1974, respondent Hughes was indicted for aggravated murder (A. JA43). Following a jury trial, Hughes was convicted of the lesser included offense of voluntary manslaughter and sentenced to six to 25 years' imprisonment (Pet. App. A63).

The evidence at trial showed that, in the presence of seven witnesses, Hughes shot an unarmed man who had "extend[ed] his hand to shake with [Hughes] as a gesture of friendship * * * and no hard feelings" (A. JA28; see *id.* at JA25). Hughes had been drinking and was apparently angry about the victim's relationship with Hughes' former girlfriend (A. JA27-JA28).

On direct review, Hughes raised no claims respecting the trial court's self-defense instruction. The Ohio Court of Appeals affirmed the conviction (A. JA54-JA56). The Ohio Supreme Court denied Hughes' motion for leave to file an appeal (A. JA58) and dismissed his appeal as of right for want of a substantial constitutional question (A. JA59).[10] Hughes' petition for federal habeas corpus presented the following claim (A. JA26):

> The prosecution failed to prove that the accused was guilty as to each and every essential element of the offense charged and the trial court failed to so instruct the trial jury.

The district court interpreted this as a challenge to the state trial court's jury instruction requiring the defendant to prove self-defense by a preponderance of

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[10] The statement in the Magistrate's report and recommended decision (A. JA27) that "[b]oth the Court of Appeals * * * and the Ohio Supreme Court, rejected each of [Hughes'] claim[s] on the merits" apparently refers to the claims Hughes did raise, not the due process claim based on the erroneous instruction.

the evidence (Pet. App. A64; see also A. JA26). Relying on *Patterson* v. *New York*, 432 U.S. 197 (1977), it held that due process does not require the state to prove the absence of self-defense (Pet. App. A65-A66; see also A. JA32-JA35). In the alternative, the district court held that Hughes' failure to make timely objection to the challenged instruction barred review of the claim in federal collateral proceedings, stating (Pet. App. A67) that Hughes "has offered no explanation or justification for failing to object to the trial court's instruction at the time of trial. Nor has any actual prejudice * * * been shown."

On appeal, the Sixth Circuit reversed and remanded on the basis of the decision in *Isaac* (Pet. App. A60).[11]

SUMMARY OF ARGUMENT

1. The major premise of this Court's decision in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), is the "familiar" principle (*Yakus* v. *United States*, 321 U.S. 414, 444 (1944)) that rights may be lost, even in criminal cases, by failure to assert them in a timely fashion. Because the substantial policy interests furthered by contemporaneous objection rules were undermined by the deliberate bypass standard of *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court expressly rejected "deliberate bypass" as the standard for determining whether a failure to raise an objection as required by a contemporaneous objection rule bars consideration of the claim in federal habeas proceedings, requiring instead a showing of both "cause" sufficient to excuse the failure to preserve the claim during the original proceedings and "actual prejudice" from the error. *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87-90.

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[11] Although Isaac appears to be the only respondent who raised any claim concerning the burden of proof on self-defense in any Ohio court, it has apparently been assumed that Ohio's post-conviction relief statute (Ohio Rev. Code Ann. § 2953.21 *et seq.* (Page 1975)) is unavailable (see Pet. App. A51 n.1; A. JA42). The Ohio Supreme Court has interpreted this statute to bar litigation of claims that were or could have been raised on direct appeal. See generally *Keener* v. *Ridenour*, 594 F.2d 581, 589-590 (6th Cir. 1979).

This Court left open for resolution in future cases the precise definition of "cause." The Sixth Circuit's decision in this case that the apparent or assumed futility of objection constitutes "cause" for excusing a procedural default virtually denies the term any content at all. To begin with, the decision apparently does not depend on counsel's actual reason for failing to preserve the claim, since the court granted relief here without any inquiry into that question. But if counsel did not withhold objection to the instructions in these cases because objection was deemed futile by him, there seems little reason for excusing the default on that basis.

Even if counsel for these three respondents considered making an objection and rejected that action as futile, the conclusion that a particular claim is unpromising is in the end not fundamentally different from any of the other reasons an attorney may decide against raising a claim. Although the cause and prejudice standard adopted in *Wainwright* was plainly thought to be significantly "narrower" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87) than the deliberate bypass standard, the Sixth Circuit's construction of the cause requirement would in many cases render the cause and prejudice standard more liberal than the deliberate bypass standard. While an attorney's judgment that a particular claim is unpromising and therefore not worth making arguably constitutes a deliberate bypass, according to the Sixth Circuit that same decision is sufficient "cause" to excuse the procedural default.

In light of the forfeiture principle upon which the decision in *Wainwright* rests, and the reasons stated for adopting the cause and prejudice standard, the assumed futility of objection cannot constitute sufficient "cause" to excuse a procedural default. Procedural rules requiring that claims be raised at particular times or forgone do not depend on the existence of established case law supporting the claims. See, *e.g.*, Fed. R. Crim. P. 12, 30; see also *Sunal* v. *Large*, 332 U.S. 174, 180-183 (1947). If the claim is to be raised, it must be raised at the time specified. Even though a claim is not firmly established by existing case law, the possibility of a

modification in the governing legal principles is always possible. Moreover, the policies furthered by enforcement of contemporaneous objection rules (see 433 U.S. at 88-90) do not turn to any degree on the clarity of the law supporting the claim.

There is no injustice worked by this principle. If at the time of trial, a particular objection would have been futile, because contrary to settled law, subsequent developments in the law do not generally establish the "exceptional circumstances" necessary to justify disregarding otherwise dispositive procedural rules. *Lee* v. *Missouri*, 439 U.S. 461, 462 (1979). There is no constitutional requirement that final convictions be reevaluated in light of each new development in the law. See, *e.g.*, *Tehan* v. *Shott*, 382 U.S. 406 (1966). The goal is fairness, not perfection. *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973).

If, on the other hand, an attorney withholds contemporaneous objection on the basis of an *erroneous* assumption that such action would be futile, there is even less reason to ignore legitimate procedural rules on the basis of futility of objection. The purposes of contemporaneous objection rules would be wholly thwarted by allowing an excuse in such circumstances. Moreover, the risk that an attorney will make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and his decision not to investigate or pursue a particular claim must ordinarily be binding on his client. Otherwise, criminal litigation will be interminable.

2. Even if "futility" would in some cases be sufficient to excuse a procedural default, the judgment of the Sixth Circuit should be reversed. In these cases, the effect of the statute had not been determined and the language of the statute itself suggested that a change had been accomplished. There is no showing that objections made to the burden of proof instructions in Ohio trial courts were uniformly overruled, or, indeed, that the courts in respondents' own cases would not have given a "proper" instruction if requested to do so. Moreover, futility cannot be measured solely by the likely disposition of an objection at trial; counsel must be presumed to be aware

of the right of appellate review. The attorney for the defendant in *State* v. *Robinson*, 47 Ohio St.2d 103, 351 N.E.2d 88 (1976), obviously did not believe that objection was futile. He made a timely objection and conclusively demonstrated that his action was not futile.

ARGUMENT

I. INTRODUCTION

This case presents an assortment of complex and interrelated issues that produced six different opinions in the court of appeals. The divergence of opinion within the court was in part a product of different points of entry into the tangle of issues, as well as different conclusions about the threshold issues. Some judges approached the case by inquiring whether the "erroneous" jury instructions on the burden of proof raised issues of constitutional magnitude or simply of state law—a question whose answer depended upon the judges' understanding of the nature of the defense of self-defense under Ohio law and their interpretations of this Court's decisions in *Patterson* v. *New York*, 432 U.S. 197 (1977), and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

If any error at respondents' trials violated only state law, federal habeas corpus relief would presumably be unavailable—quite apart from any question of procedural default—unless the Ohio Supreme Court adopted a constitutionally impermissible retroactivity rule for its decision in *State* v. *Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976). Whatever the federal approach to the retroactivity of decisions on federal law, we doubt that the Constitution requires the states, when changing from one constitutionally permissible rule to another, to give the latter any particular kind or degree of retroactive application. See, *e.g.*, *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) (Cardozo, J.).[12]

[12] "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

"We think the federal constitution has no voice upon the subject." *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, *supra*, 287 U.S. at 364.

Because the foregoing issues have relatively little impact on the administration of federal criminal justice, however, we do not undertake to address them in this brief. Rather, for purposes of this brief, we assume that the instructions on self-defense at respondents' trials raise a constitutional issue and thus present a fit subject for review in federal habeas proceedings, and we address the question whether respondents should be barred from presenting their claims because of their failure to preserve them by means of timely objection as required by a reasonable procedural rule. While this issue can manifest itself in various guises (see, *e.g.*, *Rose* v. *Lundy*, cert. granted, No. 80-846 (Feb. 23, 1981); *United States* v. *Frady*, 636 F.2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981)), we here focus upon the correctness of the plurality's rationale that a procedural default should be excused by the apparent or assumed futility of objecting to the error at trial.

II. THE APPARENT FUTILITY OF OBJECTION IS NOT SUFFICIENT "CAUSE" TO EXCUSE A PROCEDURAL DEFAULT

A. The "Cause" Requirement Of *Wainwright* Is Not Satisfied Simply By A Finding That There Was Some Reasonable Explanation For The Failure To Object

1. If a criminal defendant's failure to make timely objection would bar his claim on direct appeal, the claim is also barred on collateral attack in federal court, absent a showing of both "cause" and "actual prejudice." *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).[13] Although the decision in *Wainwright* "leave[s] open for resolution in future decisions the precise definition of the 'cause'-and-

[13] *Wainwright* did not establish a contemporaneous-objection requirement independent of any contained in state law. See, *e.g.*, *Rummel* v. *Estelle*, 445 U.S. 263, 267 n.7 (1980); *County Court of Ulster* v. *Allen*, 442 U.S. 140, 152-153, 154 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976); *Newman* v. *Henderson*, 425 U.S. 967 (1976). On the other hand, although *Wainwright* was decided in the context of a formal rule expressly requiring con-

'prejudice' standard" (*id.* at 87), it is quite plain that the standard is substantially more difficult for a habeas petitioner to satisfy than the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963). Under the deliberate bypass standard, if a criminal defendant could not be said to have waived his claim knowingly and intentionally, federal habeas corpus relief was generally available even though the claim would have been barred on direct appeal.[14] See, *e.g.*, *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972); *Fay* v. *Noia*, *supra*, 372 U.S. at 438-439.[15] Recognizing the substantial interests furthered by enforcement of contemporaneous-objection rules, this Court rejected the "deliberate bypass" standard for the purpose of determining whether the failure to comply with such a rule bars a claim on collateral attack in a federal court. *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87-88 & n.12.[16]

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temporaneous objection, the reasons for adopting the "cause" and "prejudice" standard are fully applicable even where case law rather than a specific rule bars the claim if not timely raised. Cf. *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring).

[14] The deliberate bypass standard was also adopted to determine whether a criminal defendant's failure to raise a claim in accordance with state procedural rules would bar direct review in this Court. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). The statement in the text, however, refers to direct review in state courts.

[15] "The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 [(1938)]—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. * * * [W]e wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay* v. *Noia*, *supra*, 372 U.S. at 439 (footnotes & citations omitted).

The emphasis in *Fay* v. *Noia* on the defendant's personal participation in the decision to forgo the claim was substantially eliminated in *Henry* v. *Mississippi*, *supra*, 379 U.S. at 451-452.

[16] In *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969), the deliberate bypass standard was held applicable in collateral attacks on federal convictions. The continuing vitality of *Kaufman* is questionable in light of subsequent cases, such as *Davis* v. *United States*, 411 U.S. 233 (1973), and recent federal cases have generally applied the cause and prejudice standard. See *United States* v.

Procedural rules requiring that particular types of claims be forfeited unless raised at or before trial generally do not depend on whether counsel actually considered the claim and then decided against raising it. See, *e.g.*, Fed. R. Crim. P. 12, 30. Rather, the claims must be raised at the specified time or forgone, whether the failure to comply with the rule was knowing and intentional or not. Superimposing the *Fay* v. *Noia* deliberate bypass standard on state and federal procedural rules, therefore, had the unwarranted effect of nullifying contemporaneous objection rules. While the rule might be enforced on direct appeal, federal habeas remained available. The ready availability of relief on collateral attack, however, discouraged enforcement of contemporaneous objection rules even on direct appeal. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89-90. Thus, to the extent that enforcement of contemporaneous objection rules encouraged timely objection, the deliberate bypass standard substantially diluted that incentive.

The desirability of orderly trial administration and rules of procedure is obvious. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-185 nn.10, 11 (1979). In addition, this Court has identified at least four other substantial reasons for according contemporaneous objection rules "greater respect" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88) than the deliberate bypass standard does. First, timely objection may avert error, "thereby making a major contribution to finality in criminal litigation" (*ibid.*); even if the objection comes too late to avoid an initial error, corrective measures may be taken or, at the very least, the likelihood of repetition or similar errors is reduced.[17] Second, when an individual is brought

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Hearst, 638 F.2d 1190, 1196 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Buckelew* v. *United States*, 575 F.2d 515, 519-520 (5th Cir. 1978); *Sincox* v. *United States*, 571 F.2d 876, 879-880 (5th Cir. 1978).

[17] As the Court noted in the context of a claim concerning the admission of evidence (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 89), "[a]n objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that

to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (*id.* at 90). "Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (433 U.S. at 89) and at a time when retrial is unlikely. Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88).

Thus, unlike the deliberate bypass standard of *Fay* v. *Noia*, the cause and prejudice standard does not require "'an intentional relinquishment or abandonment of a known right or privilege'" (*Fay* v. *Noia*, *supra*, 372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458,

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the * * * trial judge will admit the evidence he must contemplate the possibility of reversal by the * * * appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the * * * rejection of the federal constitutional claim."

The same is true in other contexts. For example, in the instant cases an objection to the instruction on self-defense may well have forced the prosecution to consider the possibility that an appellate court might be persuaded to read § 2901.05(A) to mean what its language suggests, namely, that only the "burden of going forward with the evidence of an affirmative defense is upon the accused," but the burden of proof on the issue is on the prosecution. Depending on the strength of his case, the prosecutor might well have been willing to accept an instruction to the effect that the state had the burden of proving that the defendant did not act in self-defense. Also, even if the prosecutor refused to accede to such a request, the trial judge might have given the instruction despite the fact that it was not unambiguously required by existing decisions.

464 (1938)). *Wainwright* rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).[18] The inquiry mandated by the *Wainwright* "cause" requirement is not merely whether the attorney had a good reason for failing to make timely objection, but whether the reason is sufficient to outweigh the substantial interests furthered by generally enforcing contemporaneous objection rules.[19]

2. The plurality opinion for the court of appeals does recognize that a habeas petitioner who has failed to make a contemporaneous objection to an erroneous jury instruction, as required by a legitimate procedural rule, must satisfy the "cause and prejudice" standard of *Wainwright* in order to have his claim considered on the merits. It finds the "cause" element satisfied in these cases because, under Ohio law at the time, "it would have seemed futile" (Pet. App. A6) to make the objection. The opinion does not explain, however, why the apparent futility of objection ought to be held to satisfy the "cause" requirement, beyond saying that a defendant "cannot be expected to predict a change in the interpretation of state law" (*ibid.*).

Putting to one side for the moment whether it could reasonably have been assumed in these cases that objection would have been futile (see Part C,

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[18] See also *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *Davis* v. *United States*, 411 U.S. 233 (1973); *Tollett* v. *Henderson*, 411 U.S. 258, 267-268 (1973); *Michel* v. *Louisiana*, 350 U.S. 91, 99 (1955). See generally Spritzer, *Criminal Waiver, Procedural Default, and the Burger Court*, 126 U. Pa. L. Rev. 473 (1978).

[19] It should be emphasized that the inquiry is not whether the defendant's interest in having his claim reviewed on the merits outweighs the state's interest in enforcing its procedural rule in his particular case. Rather, the question is whether the reason offered in a particular case is sufficiently compelling to justify disregarding the state's interest in generally enforcing its procedural rules.

infra), it should be noted that the court's holding, perhaps unwittingly, adopts the central component of the "deliberate bypass" standard in determining the existence of "cause." The principal significance of the "fact" that the decision in *Robinson* could not have been predicted, after all, is that the failure to object did not constitute a relinquishment of a known right. If that suffices to excuse a procedural default, then the "cause and prejudice" standard is no more protective of reasonable procedural rules than the standard it supplanted.[20]

In addition, the court of appeals' finding of "cause" based on the supposed futility of objection does not appear to depend at all on the actual reason counsel failed to object to the offending instruction. The court of appeals made no inquiry into the actual reasons for the defaults, and the record in the three cases is, so far as we are aware, silent on the subject. Of course, if the failure to object was not in fact the product of any assumption by counsel, reasonable or otherwise, about the futility of objection, it is difficult to understand why the possibility that some other attorney might have elected to ignore the contemporaneous objection requirement on futility grounds is sufficient to excuse the defaults in these cases.

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[20] The Sixth Circuit's reliance (Pet. App. A6) on *O'Connor* v. *Ohio*, 385 U.S. 92 (1966) (*O'Connor II*), suggests that the court's incorporation of the known-right component of the deliberate bypass standard was intentional. In *O'Connor* v. *Ohio*, 382 U.S. 286 (1965) (*O'Connor I*), this Court vacated the judgment of the Ohio Supreme Court and remanded the case for reconsideration in light of *Griffin* v. *California*, 380 U.S. 609 (1965). On remand, the state court held that the defendant's Fifth Amendment claim was barred by his failure to make timely objection to the prosecutor's comments on his failure to testify. This Court reversed (*O'Connor II*) stating (385 U.S. at 93), "Defendants can no more be charged with anticipating the *Griffin* decision than can the States." When *O'Connor II* was decided, the deliberate bypass standard had been held applicable on direct review in this Court. *Henry* v. *Mississippi*, *supra*. Thus, in *O'Connor II* this Court simply held that a defendant could not "knowingly and intentionally" waive a right that neither he nor his counsel could have known existed.

If, on the other hand, counsel considered the possibility of objecting to the instruction but rejected (deliberately bypassed?) that option because it appeared futile in light of the applicable law at the time, that too should not excuse the default. This is so even if the Sixth Circuit is right that an attorney's judgment that a particular claim is insubstantial or unlikely to be accepted constitutes a "reasonable" ground for failing to raise the claim. The court offered no basis, and we perceive none, for distinguishing the assumed futility of objection from all the other strategic or tactical considerations that must be taken into account in deciding which claims should be pursued and which forgone. Not every conceivable argument can be effectively presented in any litigation. Of necessity, an attorney must focus his attention on those claims that he believes are most likely to prove helpful. Existing case law tending to support or undercut a particular claim is only one of the many factors that must be considered. The Sixth Circuit majority effectively adopts the untenable position that because the assumed futility of objection *explains* the failure to make timely objection, it also excuses it.

We submit that the concept of "cause" cannot mean simply that defense counsel may have had some good explanation for failing to make timely objection. See *Satterfield* v. *Zahradnick*, 572 F.2d 443, 446 (4th Cir.), cert. denied, 436 U.S. 920 (1978). With respect to those claims that the attorney considered and nevertheless failed to raise, there will always be some reason, and in most cases a good reason, for his decision. He may conclude that a claim is insubstantial in light of current law and that the likelihood of prompting a change in the law is small. Or, given his theory of the case or the strength of the prosecution's case, a lawyer might conclude that a particular claim is relatively unimportant in terms of its likely impact upon the outcome of the trial (see, *e.g.*, *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 n.2 (Burger, C.J., concurring); *United States* v. *Frady*, *supra*). If a lawyer has several points to make at trial (or on appeal), any one of which might be dispositive, he may

reasonably conclude that others are not worth pursuing or, indeed, harmful, on the theory that raising an unpromising argument might divert attention from or dilute the force of other arguments that are judged more likely to succeed. See *Cole* v. *Stevenson*, 620 F.2d 1055, 1071 n.25 (4th Cir. 1980) (en banc) (Murnaghan, J., dissenting).

An advocate's goal is to win the war or, failing that, minimize the consequences of the loss, not simply to win as many little skirmishes as he can. Cf. *Tollett* v. *Henderson*, *supra*, 411 U.S. at 267-268; *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 768-771 (1970). The possible reasons for failing to raise a potentially meritorious claim are limitless. A decision to refrain from objection for reasons such as are suggested in the preceding paragraph would be an intentional and knowing one and arguably would even constitute a "deliberate bypass" of orderly trial procedures for raising the claim. See, *e.g.*, *Murch* v. *Mottram*, 409 U.S. 41 (1972); *Coco* v. *United States*, 569 F.2d 367 (5th Cir. 1978); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 291 (1975). Ironically, however, if the "cause" requirement of *Wainwright* is satisfied by the existence of a reasonable explanation for failure to raise a claim in timely fashion, it would be satisfied in each of these cases, thus making the "cause and prejudice" standard more lenient than the "deliberate bypass" standard.

B. Absent Exceptional Circumstances, An Attorney's Failure To Raise A Claim Is Binding on His Client

1. In an adversary system, "the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 (Burger, C.J., concurring). If criminal litigation is ever to come to an end, those decisions must be binding, absent "exceptional

circumstances" or the substantial possibility "of a miscarriage of justice." See *id.* at 91 & n.14; see also *id.* at 95 n.2 (Stevens, J., concurring).[21]

If the defendant has been denied a fair opportunity to raise his claim in accordance with the governing procedural rule—for example, if the trial court refuses to entertain objections to jury instructions—that would constitute sufficient "cause" to excuse an alleged procedural default.[22] Under such circumstances, the possibility of injustice is manifest and the state's interest in generally enforcing its procedural rules, however substantial, is outweighed by the defendant's right to a fair opportunity to raise his claims. Compare *Reece* v. *Georgia*, 350 U.S. 85 (1955), with *Michel* v. *Louisiana*, 350 U.S. 91 (1955). There are no doubt other "exceptional" circumstances in which the "cause" requirement would be satisfied, but it is unnecessary to speculate as to what they might be. For present purposes, it suffices to note that the focus of the inquiry must be whether the proffered explanation for the failure to make timely objection is so compelling as to justify disregard of the substantial interests furthered by enforcement of contemporaneous objection rules.

2. The apparent futility of objection should be held insufficient to constitute "cause." *E.g.*, *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *Ratcliff* v. *Estelle*, 597 F.2d 474, 476-477 (5th Cir. 1979); *United States ex rel.*

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[21] See also *Estelle* v. *Williams*, *supra*, 425 U.S. at 508 n.3; *id.* at 513-515 (Powell, J., concurring); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671, 679 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972); see generally *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149-150 (1970).

[22] See *White* v. *Estelle*, 566 F.2d 500 (5th Cir. 1978); cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465 (1976); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Sunal* v. *Large*, 332 U.S. 174, 182-183 (1947); *Boyd* v. *Mintz*, 631 F.2d 247 (3d Cir. 1980); see generally *Dumont* v. *Estelle*, 513 F.2d 793, 797 (5th Cir. 1975); see also *Pedrero* v. *Wainwright*, 590 F.2d 1383 (5th Cir. 1979); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050 (1978).

Maxey v. *Morris*, 591 F.2d 386, 391 (7th Cir.), cert. denied, 442 U.S. 912 (1979). As suggested above, an attorney's judgment that a particular claim is unpromising or not worth pursuing for other reasons is essentially a strategic or tactical decision and not fundamentally different from any other such decision. If, as in these cases, such a judgment is mistaken (see Part C, *infra*), there is certainly no justification for refusing to permit the state to enforce its procedural default rule, at least short of a finding of constitutionally ineffective assistance of counsel.[23] The possibility that an attorney will make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system and ordinarily even his "erroneous" decisions must be binding. "[T]he orderly administration of justice requires that even a criminal case some day come to an end." *Larson* v. *United States*, 275 F.2d 673, 680 (5th Cir. 1960).

Even if it would, in fact, have been futile to raise the claim at trial, however, a subsequent judicial decision ordinarily provides no reason for disregarding otherwise

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[23] Compare *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980), and *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976), with *United States* v. *Williams*, 615 F.2d 585, 591 (3d Cir. 1980), and *Boyer* v. *Patton*, 579 F.2d 284 (3d Cir. 1978), and *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978). See generally *Graham* v. *Mabry*, No. 80-1875 (8th Cir. Apr. 3, 1981), slip op. 9; *United States* v. *Hearst*, 638 F.2d 1190 (9th Cir. 1980), cert. denied, No. 80-1445 (Apr. 27, 1981); *Jiminez* v. *Estelle*, 557 F.2d 506 (5th Cir. 1977). See also *Gates* v. *Henderson*, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978). Some courts have suggested, however, that mere inadvertence or ignorance is sufficient cause. See *Rachel* v. *Bordenkircher*, 590 F.2d 200 (6th Cir. 1978) (inexperience, inattention, or lack of knowledge of the law sufficient cause); *Collins* v. *Auger*, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978), cert. denied, 439 U.S. 1133 (1979) (lack of knowledge of law or facts sufficient cause); see also *Jurek* v. *Estelle*, 593 F.2d 672, 683, 684 n.25 (5th Cir.) (in capital case, serious misfeasance is sufficient cause), vacated, 597 F.2d 590 (1979) (see 5th Cir. R. 17), decision on rehearing en banc, 623 F.2d 929 (5th Cir. 1980), cert. denied, No. 80-763 (Mar. 23, 1981).

legitimate procedural rules. See *Cole* v. *Stevenson*, *supra*, 620 F.2d at 1062-1063; *Indiviglio* v. *United States*, *supra*, 612 F.2d at 631; *Dumont* v. *Estelle*, 513 F.2d 793, 798-799 (5th Cir. 1975); see also *Ratcliff* v. *Estelle*, *supra*, 597 F.2d at 476-477; *United States ex rel. Maxey* v. *Morris*, *supra*, 591 F.2d at 391.[24] Having failed to pursue the avenues for relief provided, respondents should not be permitted in federal collateral proceedings "to justify their failure by saying they deemed any [objection] futile." *Sunal* v. *Large*, *supra*, 332 U.S. at 181.

The Sixth Circuit's holding that the assumed futility of objection is sufficient "cause" to excuse a procedural default may rest on the notion that a criminal defendant has some right to have the "important" legal issues in his case determined in light of the most recent decisions on the point (see Pet. App. A6; *id.* at A14 (Jones, J., concurring)). See also *United States* v. *Frady*, *supra*. That is, if the later decision had been the law at the time of trial, counsel would have raised the issue and it would have been decided in favor of the defendant. Since the defendant could not have known of the subsequent decision at the time of trial, he cannot be held responsible for the failure to raise the claim. Therefore, it is somehow unfair to "punish" him for failure to raise the claim, by enforcing a contemporaneous objection rule. This approach is faulty for two reasons. First, a criminal defendant has no right to have the legal issues in his case determined in light of subsequent decisions.[25] Second, it misconceives the nature of contem-

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[24] Contra, *United States* v. *Frady*, 636 F.2d 506, 513 n.17 (D.C. Cir. 1980); compare *Rummel* v. *Estelle*, 587 F.2d 651, 653 & n.2 (5th Cir. 1978) (en banc), aff'd on other grounds, 445 U.S. 263, 267 n.7 (1980).

[25] As Judge Friendly pointed out in a similar context:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal*

poraneous objection rules, which do not turn on the extent of the litigant's knowledge or blameworthiness.

This Court has frequently refused to give retroactive application to decisions announcing new legal rules in criminal cases. See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531 (1975); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, 381 U.S. 618 (1965). A criminal defendant therefore plainly has no general right to have legal issues involved in his case determined or redetermined in light of the most recent decisions of this Court or other governing authority. Nor does a criminal defendant have any substantial basis for complaint if his attorney, though competent, fails to anticipate a particular holding on a point that could have been, but was not, raised at his trial. "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (citations omitted).

The proposition that apparent futility of objection should excuse a procedural default has thus far not found favor with this Court. For example, in *Lee* v. *Missouri*, 439 U.S. 461 (1979), this Court held *Duren* v. *Missouri*, 439 U.S. 357 (1979), applicable to any case in which the jury was empaneled after the decision in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).[26] But the Court specifically noted that

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> v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

[26] *Taylor* is inapplicable to cases in which the jury was sworn prior to the date of that decision. *Daniel* v. *Louisiana*, 420 U.S. 31 (1975).

> in any case in which a jury was sworn subsequent to *Taylor* v. *Louisiana* and the fair-cross-section claim based on exclusion of women was rejected on direct review or in state collateral proceedings because of the defendant's failure to assert the claim in timely fashion, relief is unavailable under 28 U.S.C. § 2254 unless the petitioner can show cause for having failed to raise his claim properly in the state courts. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Lee v. *Missouri*, *supra*, 439 U.S. at 462. See also *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977). The subsequent decision in *Duren*, though retroactive, was not thought to constitute sufficient "cause" to excuse the failure to raise a timely objection.

It is of course true that in cases considering the retroactivity of new decisions this Court has treated the fact that the new rule relates to the reliability of the guilt-determining process as a consideration weighing strongly in favor of retroactivity. See *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 233. The court of appeals appears to have been influenced by this kind of consideration in concluding that respondents' procedural defaults should be excused. But even assuming that the Ohio Supreme Court's decision in *Robinson* was the kind that would be given full retroactive effect by this Court,[27] that does not suffice to resolve the question whether the failure to comply with legitimate procedural rules should bar the claim on collateral attack. Indeed, this Court's retroactivity decisions do not purport to decide whether a claim should be available despite a procedural default. As the Court observed in the process of holding *Mullaney* v. *Wilbur*, *supra*, retroactive in *Hankerson*, addressing

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[27] We note that *Robinson* was not a constitutional decision (47 Ohio St.2d at 113-114 n.11, 351 N.E.2d at 95-96 n.11); nor was its major purpose to remedy a defect in Ohio trial procedure that substantially impaired the truth-finding function or raised serious questions about the accuracy of verdicts in past trials. Rather, it was simply an attempt to construe a statute that the court believed had effected a change in the earlier state procedure.

the contention that retroactivity would impose substantial burdens on the administration of justice (432 U.S. at 244 n.8):

> The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

This, of course, is precisely what the Supreme Court of Ohio did in holding *Robinson* retroactive but insisting upon enforcing its contemporaneous objection rule in cases like those of respondents. Without repeating the arguments we have made above regarding the values served by contemporaneous objection rules and the difficulties in assessing, in the absence of timely objection, the importance of the issue and of differentiating between the assumed futility of objection and other tactical decisions made by counsel in the course of trial, we submit that a change of law, even an unforeseeable one, does not require Ohio to forgo enforcement of its legitimate procedural rules.

3. Substantial policy considerations counsel against accepting the notion that apparent futility, or futility in fact, is sufficient "cause" to excuse a procedural default. First, and perhaps most important, a refusal to enforce procedural defaults for this reason could have extraordinarily sweeping consequences when a new rule is announced relating to a frequently used instruction or recurring evidentiary point. Large numbers of prior cases, tried without objection under the prior practice, would become subject to invalidation in collateral attack proceedings.[28]

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[28] Since *Robinson* construed a statute that had been in effect for only two years, the number of Ohio convictions subject to reversal because of erroneous instruction on the burden of proving self-defense may be relatively small. Nevertheless, acceptance of the assumed futility of objection as sufficient "cause" to excuse a procedural default could have a far greater impact in other situations. For example, in *United States* v. *Frady*, *supra*, the D.C. Circuit held that the assumed futility of objection to certain jury instructions concerning malice that were "standard" (636 F.2d at 513

In addition, unless a retrospective judicial conclusion of futility is to be deemed sufficient without regard to the actual reasons for the default in the particular case, the federal courts will inevitably be drawn into the "complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. The answer in each case, turning on subtle degrees, would necessarily be haphazard, and its basis * * * inherently unsatisfactory" (*Dumont* v. *Estelle*, *supra*, 513 F.2d at 798). Moreover, except in a few clear cases involving overruling of settled precedent, the judgment that objection could reasonably have been deemed futile will involve a substantial element of speculation and second-guessing that would be wholly unnecessary if the procedural rule had been complied with.

Moreover, like the deliberate bypass rule, acceptance of such an excuse for a procedural default removes incentives to raise claims that may prompt improvements in the law. Compare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967). That is, there is little reason to spend time and effort pursuing a claim that is, by definition, unlikely to be successful if nothing is lost by failing to do so.

Finally, accepting "futility" as sufficient "cause" would encourage the sort of "sandbagging" criticized in *Wainwright*. An objection or argument that, if made at trial, provides only marginal prospects of affecting the result even if successful, can increase in value after conviction. If it is entertained and accepted on direct appeal the defendant will probably get a "second bite" at the apple. See, *e.g.*, *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963). A second chance for acquittal relatively soon after the first trial is valuable, but later events may make retrial substantially more difficult, if not impossible. After all other claims have been rejected, a claim that might have been relatively insignificant at

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n.17) at the time of trial was sufficient to excuse the procedural default imposed by Fed. R. Crim. P. 30. The decision in *Frady* casts doubt on the validity of every murder conviction in the District of Columbia prior to the time the standard instruction was held to be improper.

trial may as a practical matter become dispositive if accepted on collateral attack.

C. The Court of Appeals Erred In Concluding That Objection To The Self-Defense Instruction Would Have Been Futile In These Cases

Even if this Court were to agree with the general proposition that a defendant may be excused from a default due to noncompliance with a contemporaneous objection requirement when it is clear that objection would have been futile, the court of appeals' application of that principle to the present cases cannot be justified. There is simply no basis for the conclusion that objection to the instructions placing the burden of proof of self-defense on these respondents would have been futile.

At the outset, it must be noted that futility cannot be assessed solely on the basis of the likely ruling of the trial court on the motion or objection. A defendant's counsel obviously is aware, at the time he is deciding whether to preserve his claim, that any conviction is subject to appellate review, and, if the claim is based on the federal Constitution, that there exists the possibility of direct review by this Court or collateral review pursuant to 28 U.S.C. 2254 in the federal district court. Unless it may reasonably be concluded that the claim is bound to be rejected by any reviewing courts to which it may be presented, there cannot be the kind of manifest futility that could even arguably suffice to overcome the interests of the state in enforcement of orderly rules of procedure.

In the present cases, it seems plain that timely objection could not reasonably have been determined to be futile. The language of § 2901.05(A) is readily susceptible to the construction adopted soon after respondents' trials by the Supreme Court of Ohio in *State* v. *Robinson*, *supra*, placing only the burden of going forward with the evidence of self-defense on the accused. There has in fact been no showing that other similarly situated defendants who requested instructions to that effect were consistently or even usually refused their requests by

the trial courts in Ohio. It is thus entirely possible that timely and adequately explained requests for favorable instructions in respondents' own trials would have been accepted by the trial courts. See *State* v. *Robinson*, 48 Ohio App.2d 197, 200-201, 356 N.E.2d 725, 727-728 (1975).

In any event, even if contemporaneous objection would have been unavailing in the trial courts, preservation of the objection would not have been futile, as the defendant in *Robinson* proved. Nothing in *Robinson* suggests that such an objection would have been rejected even on January 1, 1974, the effective date of § 2901.05 (A). The court relied primarily on the legislative history of the statute and its language. *State* v. *Robinson*, *supra*, 47 Ohio St.2d at 110-113, 351 N.E.2d at 93-95; see also *State* v. *Robinson*, *supra*, 48 Ohio App.2d at 200-201, 356 N.E.2d at 727-728.

The dictum in *State* v. *Rogers*, 43 Ohio St.2d 28, 330 N.E.2d 674 (1975), on which the plurality opinion relied to support the conclusion that "it would have seemed futile for Isaac to object" (Pet. App. A6), is an insubstantial basis for a finding of futility.[29] Compare *United States* v. *Sobell*, *supra*, 314 F.2d at 330-331. Indeed, the majority in *Robinson* apparently felt no need to address *Rogers*, although it was cited in the dissent (see 47 Ohio St.2d at 117-118, 351 N.E.2d at 97-98).[30] Dictum that is arguably inconsistent with the plain language of a statute can hardly be regarded as dispositive. Since it was clear that the court had not considered the effect of the statute in *Rogers*, it is difficult to see how respondents or their attorneys could have reasonably believed that the issue was foreclosed by existing case law. In sum, unless any objection for which there is no decision precisely on point is futile, it cannot

[29] The law in Ohio prior to the enactment of § 2901.05(A) is beside the point. The question is whether the statutory provision effected a change in the law. That question was not addressed in *Rogers*.

[30] Nor did the state court of appeals in *Robinson* find it necessary to discuss the dictum in *Rogers*. See 48 Ohio App.2d at 200-201, 356 N.E.2d at 727-728.

reasonably be concluded that objection in these cases was.[31]

CONCLUSION

The judgments of the United States Court of Appeals for the Sixth Circuit should be reversed or vacated and remanded.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
GEORGE W. JONES
Assistant to the Solicitor General

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[31] Although we are uncertain whether the second question presented in the petition for a writ of certiorari (Pet. i) embraces the issue, we note our concern with the manner in which the court of appeals disposed of the "prejudice" component of the "cause and prejudice" standard. Without evaluation or even mention of the evidence at trial, the court of appeals concluded that actual prejudice had been shown simply because each of the respondents had raised the issue of self-defense at trial (see Pet. App. A6 & n.3; *id.* at A46; *id.* at A60). It may be, however, that, as in *Wainwright* (433 U.S. at 91), "the * * * evidence of guilt [and of the absence of self-defense] at trial * * * was substantial to a degree that would negate any possibility of actual prejudice" resulting from the erroneous jury instructions in each of these cases. For example, it seems quite doubtful that respondent Hughes suffered any actual prejudice. The evidence at trial showed that immediately after the victim had extended his hand "to shake with [Hughes] as a gesture of friendship * * * and no hard feelings," Hughes shot the unarmed man twice in the presence of seven witnesses (A. JA28; see *id.* at JA27, JA55-JA56). The only evidence to support the self-defense theory was Hughes' own somewhat vague testimony (A. JA28-JA29).

In our view, therefore, once the court of appeals concluded that "cause" sufficient to excuse the failure to object at trial had been shown, it should have remanded to the district courts for an assessment of actual prejudice in light of the trial record.

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